135-449

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 207.

JOSEPH J. BURNS AND ROBERT TARR, APPELLANTS,

vs.

JULIUS W. ROSENSTEIN, LEO ROSENSTEIN, AND HENRY SELLMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 16, 1886.

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1 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable Le Baron B. Colt, circuit judge.

JULIUS W. ROSENSTEIN *et al.*, Complainants, *v.* JOSEPH J. BURNS *et al.*, Defendants. } 1746, Equity Docket.

This cause was begun in the supreme judicial court of the Commonwealth of Massachusetts, for the county of Essex, and removed to this circuit court upon the petition of the defendants, and here entered at the May term, A. D. 1882.

2 Upon the entry of said cause in this circuit court, on the fifteenth day of May, A. D. 1882, the following certified copy was filed, namely:

Copy of papers in Julius W. Rosenstein *et al. versus* Joseph J. Burns *et al.* and trustees, removed on petition from the supreme judicial court, for the county of Essex, Commonwealth of Massachusetts, to the circuit court of the United States.

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss:*

At the supreme judicial court begun and held at Salem, within and for the county of Essex, on the third Tuesday, being the eighteenth day of April, in the year of our Lord one thousand eight hundred and eighty-two.

Copy of Writ.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

[SEAL.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Joseph J. Burns and Robert Tarr, of Gloucester, in our county of Essex, copartners under the firm name of J. J. Burns & Co., to the value of twenty thousand dollars, and summon the said defendants, if they may be found in your precinct, to appear before our justices of

3 our supreme judicial court, at the rules to be holden at the clerk's office in Salem, within and for our county of Essex, on the first Monday of December next, then and there in our said court to answer unto Julius W. Rosenstein and Leo Rosenstein and Henry Sellman, of the city, county, and State of New York, in an action of

contract, to wit, in and unto their bill in equity, which is herein set forth as follows, to wit:

(Copy of bill follows after copy of writ and return.)

To the damage of the said plaintiffs (as they say) the sum of twenty thousand dollars, which shall then and there be made to appear, with other due damages. And whereas the said plaintiffs say that the said defendants have not in their own hands and possession goods and estate to the value of twenty thousand dollars aforesaid which can be come at to be attached, but have intrusted to and deposited in the hands and possession of George Clark and John E. Somes, of said Gloucester, copartners under the firm name of Clark and Somes, and John Pew, Charles H. Pew, John J. Pew, and John K. Dustin, Jr., copartners under the firm name of John Pew and Son; Charles C. Cressey and Slade Gorton, copartners under the firm name of Slade Gorton and Company, and Stephen Dood, all of said Gloucester, trustees of the said defendants, goods, effects, and credits to the said value, we command you, therefore, that you summon the said George Clark and John E. Somes, copartners as aforesaid, if they may be found in your precinct, to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any they have, why execution to be issued upon such
4 judgment as the said plaintiffs may recover against the said defendants in this action (if any) should not issue against the goods, effects, or credits in the hands and possession of them, the said Clark and Somes.

And have you there this writ with your doings therein.

Witness Horace Gray, Esquire, at Boston, the seventh day of November, in the year of our Lord one thousand eight hundred and eighty-one.

JOHN NOBLE, *Clerk.*

Copy of Officer's Return on Writ.

ESSEX, *ss:*

GLOUCESTER, *November 7th*, 1881.

By virtue of this writ I this day, at four o'clock p. m., attached all the real estate of the within-named Joseph J. Burns and Robert Tarr in said county of Essex (southern district), and all their right, title, and interest to or in any real estate in said county and district, and on the same day I deposited an attested copy of this writ, except the declaration, with my return of said attachment thereon, in the office of the register of deeds, southern district, for said county; and on the eighth day of the same November, at nine o'clock a. m., I summoned the within-named George Clark and John E. Somes to appear at court, as within specified, by giving in hand to said George Clark an attested copy of this writ, except the declaration; and on the same eighth day of November I attached all the right, title, and interest that the within-named Joseph J. Burns and Robert Tarr has in or to the personal property named in the schedule hereunto annexed and marked "A" and which makes part of this my return; and on the tenth day of the same November, at ten o'clock

a. m., I summoned the within-named John Pew, Charles H. Pew,
5 John J. Pew and John K. Dustin, Jr., to appear at court, as within specified, by giving in hand to said John Pew an attested copy of this writ, except the declaration. I also at the same time summoned Stephen Dodd, within named, as within directed, to appear at court by giving him in hand an attested copy of this writ, except the declaration; and on the same tenth day of November, at 9½ o'clock a. m., I summoned the within-named Slade Gorton and Charles C. Cressey to appear at court, as within directed, by giving in hand to Slade Gorton an attested copy of this writ, except the declaration; and on the eighteenth day of November, A. D. 1881, I attached all the right, title, and interest that the within-named Joseph J. Burns and Robert Tarr has [have] in the schooner Gazelle and schooner Excelsior and their tackle and apparel and furniture thereto belonging, and now have said property in charge of keepers; and on the nineteenth day of November, A. D. 1881, I gave in hand to the within-named Joseph J. Burns an attested copy of this writ, with a copy of the bill in equity and agreement thereon, and a like copy in hand to the within-named Robert Tarr, for their appearance at court, as within specified; and on the twenty-first day of the same November I gave in hand to each of the within-named defendants a summons for their appearance at court, as within directed. I also, on the thirtieth day of November, A. D. 1881, deposited an attested copy of this writ, except the declaration, with my return of the attachment of the following-named property thereon: One steam-engine and boiler, one steam boiler and fixtures thereto belonging, three bath boilers, tubes, and fixtures, one steam-box and fittings,
6 one cooking range, one press machine, one press roller, one grinder, said property being now in the buildings occupied by the Union Fish Company, and situate on Fort wharf, so called, in said Gloucester.

Fees, service, &c., attachment	$6 00
Travel, 160; 5 copies	5 00
3 copies, with declaration	9 00
Paid for recording & travel	1 30
Paid for keepers	280 00
Paid for packing in cases	35 00
Paid for soldering cans	275 00
Paid for stove	6 00
" " coal	5 00
" " oil	2 00
" " express	1 75
Custody	5 00
	$631 05

GEORGE LANE,
Deputy Sheriff.

I hereby certify that the expenses and disbursements charged in

my return upon this writ are reasonable and were actually incurred.

GEORGE LANE,
Deputy Sheriff.

Dec. 5, 1881.

Sworn to before me—

SAMUEL A. JOHNSON,
Justice of the Peace.

Copy A.

Twelve hundred sixty cases of canned fish and cases.
Seven hundred seventy-seven cases of cans and cases.
Eighteen hundred ninety-six cans of fish of bad quality & cases.
Two barrels of lubricating oil & barrels.
Sixty-five barrels of salt herring & barrels.
Thirteen barrels of catsup sauce " "
Four barrels of mustard sauce " "
Four barrels of vinegar " "
One barrel of ground pepper " "
Six fish racks, two-thirds barrel salad oil & barrel.
Twelve lanterns, twenty-four stools.
7 Fifty kerosene lamps, three weighing scales.
Seven wire brushes, lot of labels.
Two bags of allspice, forty-five pounds of allspice.
Three hundred fifty-seven lbs. of table salt.
Three hundred wire flakes, lot of solder.
About eight hundred bushels of charcoal, more or less.
Schooner Gazelle and the schooner Excelsior.
Two hand force-pumps, fourteen barrels of salt mackerel & barrels.
Four hundred & forty barrels of pumice [pomace] & barrels.
Fourteen barrels of salt mackerel & barrels.
One steam engine and boiler.
One steam-boiler and fixtures thereto belonging.
Three bath boilers, tubes and fixtures.
One steam-box and fixtures and cooking range.
One press machine, one press roller, and one grinder.

Copy of Affidavit as to Ad Damnum.

COUNTY OF ESSEX, *ss:*

Henry Sellman, of and in behalf of the plaintiffs in this writ, before the service thereof, on oath declares that he verily believes the matter sought to be recovered in the action hereby commenced actually equals in amount or value the sum of four thousand dollars.

HENRY SELLMAN.

Subscribed and sworn to this seventh day of November, A. D. 1881.

Before me—

WM. F. SLOCUM,
Justice of the Peace.

8 *Copy of Affidavit, &c., for Arrest.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } ss:

Nov. 18, 1881.

I, William F. Slocum, in behalf of the plaintiffs in the annexed writ, on oath declare that I believe and have reason to believe that the plaintiffs have a good cause of action against the defendants; that they have reasonable expectation of recovering a sum equal, at least, to one-third the damages claimed in the writ, exclusive of all costs.

WM. F. SLOCUM.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } ss:

Nov. 18, A. D. 1881.

Personally appeared the above-named William F. Slocum and made oath that the above affidavit by him subscribed is true; and I certify that I am satisfied the same is true.

WM. W. BLACKMAR,
Master in Chancery.

Copy of Bill Inserted in Writ.

(MEMORANDUM.—In extending the record in this case this "copy of bill inserted in writ" is omitted, the same being superseded by the amended bill of complaint, filed in State court December 19, 1881.—John G. Stetson, clerk.)

Copy of Answer. (*Filed in State Court Dec.* 5, 1881.)

(MEMORANDUM.—In extending the record in this case this "copy of answer" is omitted, the same being superseded by the subsequent pleadings.—John G. Stetson, clerk.)

9 *Amended Bill of Complaint.* (*Filed in State Court Dec.* 19, 1881.)

To the honorable the justices of the supreme judicial court:

Your complainants, Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman, of the city, county, and State of New York, show unto your honors against Joseph J. Burns and Robert Tarr, of Gloucester, in said county of Essex—

1. That your complainants and the said defendants, on or about the twenty-second day of April, A. D. 1881, made and entered into an agreement, partly oral and in part by correspondence in writing, for the purpose of canning fish and the manufacture of pomace and fish guano, and commenced business under the same; and thereafter, to wit, on or about the first day of July, A. D. 1881, your complainants and said defendants made, entered into, and executed an agreement in writing, a copy of which is annexed to the original bill of complaint in this cause, of which this bill is an amendment, and marked "A," and here referred to and made a part of this bill, for the purposes aforesaid, which last above-mentioned agreement was intended to and your complainants are advised and believe did supersede and take the place of the agreement first above mentioned, and cover all the business and transactions had or done, as well as the business and transactions to be had or done, by or between the parties in, about, or relating to said business; and your complainants have at all times observed, kept, and performed all and singular the stipulations and agreements by them on their part to be observed, kept, and performed by virtue of said agreement, and your complainants have advanced, laid out, and expended of their own moneys under said agreement and for and on account of the business therein provided for a large sum of money, to wit, the sum of sixty-one thousand two hundred and eighty-five dollars and sixty-two cents; that they have realized from sales of goods only thirty-seven thousand three hundred and twenty-five dollars and ninety-three cents or thereabouts; that said sum realized by your complainants, as above mentioned, was for five thousand nine hundred and seventy-seven cases of goods sold by your complainants, and for which, under the eighteenth article in said agreement, they are entitled to twenty-five cents per case, amounting to fourteen hundred and ninety-four dollars and twenty-five cents; that the amount due your complainants for interest on money advanced by them in, for, and on account of said business under said agreement — the sum of seven hundred and thirty-six dollars and twenty-four cents or thereabouts, and the further sum of seven hundred and fifty dollars or thereabouts for traveling expenses, under said agreement, making a balance due your complainants under said agreement of twenty-six thousand nine hundred and forty dollars and eighteen cents or thereabouts over and above all sums of money received by them; that claims are made against your complainants for and on account of goods said to have been had, damaged, and spoiled, being part of the goods sold by your complainants, as above stated, and included in said sales, to the amount of two thousand dollars or thereabouts, which goods were damaged, your complainants are informed and believe, by the misconduct and negligence of the defendants and in violation of their part of said agreement, as hereinafter more fully stated; that there are in the hands of your complainants twenty-eight hundred and forty-six cases of goods unsold, or thereabouts, which, if found to be good and merchantable and can be sold at their fair market value, will amount to fifteen thousand four hundred and fifty-seven dollars and

fifty cents or thereabouts, from which your complainants will be entitled to receive, under the eighteenth article in said agreement, twenty-five cents per case, to wit, the sum of seven hundred and eleven dollars and fifty cents, being only a balance of fourteen thousand seven hundred and forty-six dollars of proceeds of said unsold goods in your complainants' hands to be applied on the aforesaid balance due to them; and your complainants are informed and believe that there are other and further claims to be made upon them for damages by reason of the bad, damaged, and spoiled condition of goods sold by them as aforesaid, and that there are outstanding claims by reason of goods ordered and purchased in the name of said Union Fish Company by said defendants, and, although the same were so ordered in violation of said agreement, your
11 complainants are informed and believe the parties holding the same look to your complainants for the payment thereof, and that the balance due your complainants, when the same and said damages are paid, and said unsold goods are sold and the proceeds are applied to your complainants' account, of [is] more than sixteen thousand dollars.

2. Said defendants, under the fifth article in said agreement, agreed with the complainants that they, the said defendants, would keep in the factory office complete and correct books and accounts necessary for the management and control of the factory, subject to the examination of the complainants, and to render to the complainants Rosenstein weekly statements of articles received, goods packed and shipped, and cash paid for fish, wages, and other items; but the said defendants have not regarded and kept their agreement in this article contained, and your complainants are informed and believe that they have not kept correct and complete books and accounts, or permitted the complainants to examine any such books and accounts if kept; and the defendants, though often requested and urged so to do by your complainants, have not rendered to said Rosensteins or either of them a weekly statement of articles received, goods packed and shipped, and cash paid for fish, wages, and other articles, as therein required.

3. The defendants, by the sixth article in said agreement, engaged and agreed to have charge of and superintend the factory and devote all necessary time to the interest of the business generally as regards all business in Gloucester; and your complainants are informed and believe that the defendants have not taken such care of the business in Gloucester or given such care in the superintendence of the factory as is required by said article, and that they have not devoted all necessary time to the interests of the business, as therein required, but have grossly neglected said business.

4. The defendants, by the seventh article in said agreement, agreed to manufacture and put up such articles and such quantities of the same only, at lowest possible cost, as said Rosensteins deem advisable, quality of the goods to be good and merchantable; but said defendants have disregarded this part of their agreement, and although requested and advised by said Rosensteins to put up goods

required in said agreement, such as they were selling and
12 such as the market and their customers required, and especially mackerel canned with tomato sauce, as directed and requested by said Rosensteins, neglected and refused so to do, and put up spiced mackerel, in opposition and contrary to the desire and request of said Rosensteins, grossly to the loss and injury of said business; and defendants have put up a large amount of goods that are not good and merchantable—goods that were spoiled and unfit for use—to the damage of said business and to the injury of the plaintiffs' other business as dealers in and manufacturers of similar kinds of goods of a good quality; that the plaintiffs have dealt and have the reputation for dealing in goods of good quality and none others, which reputation they are justly entitled to, and is of very great value to them, and has been injured already and is in danger of being injured still further by reason of the poor quality of and damaged and unmerchantable goods which the defendants have made, canned, and shipped in said business in violation of said agreement, and especially of the seventh article therein.

5. In and by articles third, thirteenth, and fifteenth in said agreement said defendants agreed that said Rosenstein Brothers should sell all the goods manufactured by the parties under said agreement, and that all manufactured goods should be shipped to said Rosensteins direct, or according to their instructions, and as soon as ready for shipment, unless otherwise instructed by them, the defendants to have the privilege of supplying any trade in the immediate neighborhood of the factory at same prices realized by said Rosensteins; but the said defendants have, regardless of this agreement, sold a large amount of goods, as your complainants are informed and believe, for the Chicago market and other markets and places not in the immediate neighborhood of said factory; and your complainants are informed and believe that the defendants sold or put into the hands of one Clark & Somes a large amount of goods manufactured under said agreement for sale, to wit, the amount and value of twenty-five hundred dollars, to be sold in the Chicago market, in evasion and violation of this part of said agreement; and the defendants, instead of shipping the goods put up to said Rosensteins, according to their agreement, as soon as ready for shipment, have purposely,
as your complainants are informed and believe, kept back
13 and held in their own hands a large amount of goods for the purpose of sale elsewhere and otherwise than to supply the trade in the neighborhood of said factory by themselves, and for the purpose of appropriating the proceeds thereof to their own use, contrary to the provisions of said agreement.

6. By the twenty-eighth article in said agreement it was agreed by the defendants that the said Rosenteins or Sellman should have the privilege and option to co-operate with the defendants in the practical and personal superintendence and management of the factory at Gloucester whenever they deem advisable or necessary; but although they did deem it advisable and necessary, yet the defendants would not give them the privilege, option, or opportunity to co-operate with defendants in the practical and personal superin-

tendence and management of said factory and excluded them from all such co-operation in the superintendence and management thereof, and threatened their authorized agent with personal violence and threatened to assault and beat said agent if he came to said factory, and managed and carried on the same contrary to the request and advice of the plaintiffs, whereby great and serious losses have occurred to said business and to your complainants and a large amount of fish purchased for said business with money furnished by the plaintiff was spoiled and lost, and a large amount of bad, spoiled, and unmerchantable goods were put up and canned by them.

7. Said defendants have violated their said agreements in that they have not kept proper factory books and accounts and have packed poor and unmerchantable goods and have not shipped the goods to Rosenstein Brothers as soon as ready, and have managed and conducted the business against the orders and expressed wishes of the plaintiffs; have ordered and purchased cans of other parties; have refused to allow or to permit the plaintiffs to co-operate in the superintendence of the factory at Gloucester, and have purchased at times a vastly larger amount of fish than they could cure or care for, against and contrary to the expressed instructions and wishes of the plaintiffs, whereby the same was damaged and lost, and have generally so badly managed and conducted the business, in violation of said agreement, that they have caused very great and ruinous losses to said business and to your complainants, and, among other
14 things, a large amount of fish and mackerel, to wit, about two hundred thousand mackerel, which the defendants claim to have purchased for and on account of said company, and for which your complainants have advanced money, have been lost or are unaccounted for otherwise by the defendants, and the defendants have refused and neglected, though requested so to do by your complainants, to employ a sufficient number of persons to seal the cans after the same were packed, whereby the same and a large amount thereof were left for a long time unsealed and the fish packed therein was damaged and spoiled, and the defendants allowed a large amount of mackerel which was purchased by the defendants for said company, for which the plaintiffs advanced and furnished money, to remain in different stages of preparation for canning in such improper condition and such improper length of time that the same, before they were canned, were spoiled, to the great loss and damage of your complainants and against the request and advice of the plaintiffs, and paid more than the market price, as your complainants are informed and believe, for fish purchased by them for said business.

8. That your complainants are informed and believe that the defendants have annexed to the real estate upon which said factory is situate a large brick oven, costing and of the value of six hundred and fifty dollars, and other articles and machinery of great value, but the description and accurate value of the same your complainants are now unable to give more fully, and have conveyed said real estate in fee and in mortgage to one Lucy D. Rogers to secure their own

indebtedness to her to the amount of twenty-three thousand dollars and interest thereon; that said oven and other machinery so annexed to the real estate as aforesaid by the defendants was purchased with the moneys advanced by your complainants for that purpose under said agreement and should have been credited to them and charged to the machinery account, as mentioned in said agreement; and your complainants are informed, advised, and believe that said defendants have so annexed the same to the real estate as aforesaid as to make the same a part of the realty as against said mortgage, and that the defendants claim and pretend that the same, together with an engine and boiler purchased with funds advanced by your complainants as aforesaid, are so annexed to the real estate as to become a part thereof; and your complainants are informed and believe that thereby the said defendants have wrongfully and fraudulently converted the same to their own use, in violation of the rights of your complainants under said agreement.

9. The defendants, to induce your complainants to enter into said agreement and advance the moneys as hereinbefore stated, knowingly and falsely pretended and represented to your complainants that Gloucester was the greatest place in the country to get mackerel for canning to supply the factory, and that they could be obtained there cheaper than anywhere in the country; that the said defendants had traps of their own patent sufficient to supply all the fish that would be required, whereas, in truth and fact, Gloucester was not the greatest place in the country to get mackerel for canning to supply the factory, and they could not be obtained there cheaper than anywhere in the country, and the defendants had not traps of their own patent sufficient to supply all the fish that would be required; and, on the contrary, although the past season was one in which there was a large catch of mackerel generally, there was not a sufficient supply of mackerel for the factory taken by the defendants in their traps or purchased by them in Gloucester for said factory, but they had to and did procure a very large part, to wit, seventy-five per cent., of the mackerel they used in said factory in the city of Boston or elsewhere than in said Gloucester, and by means of said false representation the plaintiffs were induced to enter into said agreement, and would not have executed the same had they not believed the said statement and representation of the defendants aforesaid to be true, and by reason of said false representations the defendants were led to believe that said business could be carried on advantageously and at a large profit at said Gloucester, whereas, in fact, it cannot be so carried on there in competition with other places at a large profit or at such a profit as to have induced your complainants to have entered into said agreement had they been duly informed in regard thereto; and your complainants are informed and believe that the defendants are not of sufficient financial ability to pay their share of the losses of carrying on said business that have been made and incurred and that will be made in said business if the same be continued, or to pay your complainants for the goods that they have sold, as here-

16 inbefore stated, in violation of said agreement or the amounts due to your complainants under said agreement.

10. That your complainants have requested the defendants to deliver up to them the amount and claim for and proceeds of the goods sold by the defendants, as above stated, to Clark and Somes or for the Chicago market, and to deliver up to your complainants the canned goods in their hands and possession which ought by the provisions of said agreement to be shipped to said Rosensteins, or to ship the same to said Rosensteins according to their said agreement, and to render to your complainants an account and statement as required by said agreement, all of which the defendants have neglected and refused to do.

And your complainants are informed and believe that said defendants purpose and intend to sell and dispose of said canned goods and to appropriate the same or the proceeds thereof to their own use, in violation of their said agreement, and especially of the said third, thirteenth, and fifteenth articles thereof.

11. And your complainants are informed and believe that by reason of the matters and things hereinbefore mentioned and stated, and especially by reason of the many violations of the provisions of said agreement by the defendants and their misconduct, said business cannot be carried on or continued except at a great and ruinous loss and danger to the property of your complainants; and that your complainants ought not further to continue or be required to continue in said business with the defendants, and that the company formed by said agreement ought to be dissolved.

All which doings of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your complainants.

In consideration whereof, and forasmuch as your complainants can only have adequate relief in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end that the said defendants may answer all and singular the premises (but not under oath, their oath to such answer being hereby expressly waived), and that they may be required to render an account of all disbursements, expenses, and receipts of money or other things in or from said business, and of all goods sold or disposed of by them in

17 any way, and to deliver up to your complainants the canned goods and all other goods on hand in or belonging to said business, and to pay your complainants such sums of money as shall be found to be due to them from the defendants for or on account of any of the matters and things herein stated or contained and all damages occasioned by their violation of said agreement and the misconduct and deceit and injury to your complainants, as hereinbefore stated, and that said company may be dissolved, and that a receiver may be appointed to receive, take, and dispose of the goods and effects of said company and to settle its affairs under the direction of this honorable court, and that the defendants may be restrained by a writ of injunction from this honorable court from selling or disposing of any goods or property of said company or from collecting the proceeds of any goods disposed of by them in

violation of said agreement, as hereinbefore stated, and that your complainant may have such other and further relief as the nature of this case may require and to your honors shall seem meet—

May it please your honors to grant unto your complainant a writ of injunction to restrain said defendants from selling or disposing of any goods or property of said company and from collecting the proceeds of goods sold or disposed of by them, as herein stated, and also a writ of subpœna, to be directed to the said Joseph J. Burns and Robert Tarr, of said Gloucester, commanding them on a certain day to appear before your honors and answer the premises and abide such order and decree as to your honors shall seem meet; and your complainant shall ever pray.

By their attorneys, W. F. AND W. S. SLOCUM.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Henry Sellman, one of the complainants in the foregoing bill, does depose and say that he has heard the foregoing bill of complaint read and is acquainted with the contents thereof, and that the same is true of his own knowledge except as to matters therein alleged and stated to be upon information and belief, and as to those matters that he believes it to be true.

HENRY SELLMAN.

18 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Subscribed and sworn to this tenth day of December, A. D. 1881, before me—

WM. F. SLOCUM,
Justice of the Peace.

A.

Memorandum of Contract between Rosenstein Bros. and Henry Sellman, of New York, and J. J. Burns & Co., of Gloucester, Mass.

1. Object of the association is the canning of fish, more particularly mackerel, and the manufacture of pomace, or fish guano.

2. The business is to be done under the name of the Union Fish Company of Gloucester, Mass.

3. Rosenstein Bros. are to furnish the capital to carry on the business, and are to furnish also all material at cost and to sell all goods manufactured by the parties hereto at best obtainable market prices.

4. Rosenstein Bros. are to keep in their office, in New York, a correct and complete set of books (double entry), subject to examination by any of the parties hereto, and to render monthly statements to J. J. Burns & Co. of all goods purchased and shipped to factory and all cash paid for other items for account of the business.

5. J. J. Burns & Co. are to keep in the factory's office correct and complete books and accounts necessary for the management and

control of the factory, subject to the examination of any party hereto, and to render to Rosenstein Bros. weekly statements of articles received, goods packed and shipped, and cash paid for fish, wages, and other items.

6. J. J. Burns & Co. are to have charge of and superintend the factory and devote all necessary time to the interest of the business generally as regards all business at Gloucester.

7. J. J. Burns & Co. agree to manufacture and put up such articles and such quantities of the same only, at lowest possible
19 cost, as Rosenstein Bros. deem advisable; quality of the goods to be good, merchantable.

8. J. J. Burns & Co. agree not to associate with any other party in the business of canning fish and manufacture of fish guano during the continuance of this contract.

9. It is agreed between the parties that all machines and machinery, apparatus, tools, untensils, fixtures, etc., are to be charged to a separate account, called machinery account, and that account is to be credited yearly, prior to taking inventory, with an amount equal to ten per cent. of the total amount of the account, which amount of ten per cent. is to be charged to profit and loss account.

10. Upon termination of contract and dissolution of copartnership J. J. Burns & Co. shall have the privilege to assume for their own account balance of machinery account for cash, or, if declined by them, all articles charged to that account shall be disposed of to best advantage for mutual account.

11. The business of the copartnership is to be conducted on premises hired from J. J. Burns & Co. for the term of this contract, and it is agreed that J. J. Burns & Co. shall be paid the sum of twelve hundred dollars annually for the use of the following premises, viz:

a. Factory proper, $300.
b. Building on wharf and shed, $300.
c. Pomace factory, $350.
d. Shamrock shed, $100.
e. Premises vacated by Prof. Baird, $150. Total, $1,200.

12. J. J. Burns & Co. shall have the privilege of supplying the requisite quantities of mackerel out of their own traps at lowest Boston market prices, as well as other fish for canning.

13. All manufactured goods are to be shipped to Rosenstein Brothers direct, or according to their instructions; but J. J. Burns & Co. shall have the privilege to supply any trade in the immediate neighborhood of the factory at same prices as realized by Rosenstein Brothers.

14. A statement of all sales by either party, as well as of prices realized, shall be rendered mutually at the beginning of every month.

20 15. All manufactured stock shall be shipped to Rosenstein Brothers as soon as ready for shipment, unless otherwise instructed by them.

16. No financial business, such as making and indorsing of notes and bills of exchange, drawing, accepting, or indorsing of drafts,

etc., shall be done by either party, except in their own firm names, and not under any circumstances in the name of the Union Fish Company of Glouster.

17. Interest on the capital invested by Rosenstein Brothers is to be computed at the rate of six per cent. per annum.

18. Rosenstein Brothers are to be allowed twenty-five cents per case on all goods sold by them for storage, insuarance, labor, stationery, and all office work in New York, as also one thousand dollars per annum to defray traveling expenses for the purpose of introducing and effecting sales of the goods.

19. All freights, cartages, and marine insurances are to be charged separately and in addition to above.

20. It is agreed that a correct inventory be taken on the 31st of December of every year of all assets and liabilities, and a balance sheet be drawn, and the amount of profit or loss up to the 31st of December be determined by the customary methods of double-entry bookkeeping The machinery shall be valued as per machinery account, less the reduction charged off for wear and tear. The materials shall be valued at what it would cost to lay them into store or factory and the manufactured stock at cost price.

21. It is agreed that Rosenstein Brothers and Henry Sellman jointly shall be entitled to five-eighths of the net profits of the business, and J. J. Burns & Co. shall be entitled to three-eighths of the net profits.

22. It is agreed that all losses, if any sustained, by reason of bad debts shall be charged to profit and loss account, and are to be borne by the parties jointly in the ratio of their stipulated interest.

23. It is agreed that after the books have been closed and the profits ascertained the parties hereto shall be at liberty to withdraw their respective shares of profit, less their share in machinery account, stock on hand, and amounts outstanding but not collected, and less all amounts drawn by them or charged to their account during the year.

21

24. This contract shall be in force during the term of five years, commencing May 1, 1881, and terminating April 30, 1886.

25. J. J. Burns & Co. are to draw on Rosenstein Brothers for funds required in the business in sums of not over fifteen hundred dollars in any one draft.

26. J. J. Burns & Co. are permitted to draw from the funds of the business fifty dollars per week for individual use and account.

27. It is agreed that the death of any party to this contract shall not terminate their interest in the business, but the survivors shall carry it on just the same to the termination of the contract for account of the heirs, administrators, or assigns of such deceased party or parties, but without interference on the part of any such heirs, administrators, or assigns.

28. It shall be the privilege and option of Rosenstein Brothers or Henry Sellman to co-operate with J. J. Burns & Co. in the practical and personal superintendence and management of the factory at Gloucester whenever they deem it advisable or necessary.

29. This memorandum and all stipulations and agreements con-

tained therein shall be binding on the parties thereto until the completion, signing, sealing, and delivery of a contract drawn up in legal form in conformity herewith.

(Signed) ROSENSTEIN BROTHERS,
By A. GOLDMARK.
HENRY SELLMAN.
J. J. BURNS & CO.

Witness:
FRANK J. SELLMAN.

22 *Copy of Petition and Order of Court Thereon.*

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } ss:

Supreme Judicial Court.

JULIUS W. ROSENSTEIN *et al.*
v.
JOSEPH J. BURNS *et al.* and Trustees. } In Equity.

And now come Joseph J. Burns and Robert Tarr, the defendants in the above-entitled cause, and say that the plaintiffs, on the — days of November, A. D. 1881, made an attachment in said suit of all the defendants' real estate in said county of Essex and personal property to the amount of twenty thousand dollars, and also of all the goods, effects, and credits of the defendants in the hands and possession of the persons summoned as trustees in said suit, all of which real estate and personal property and goods, effects, and credits aforesaid are now under said attachment; and the defendants further say that said suit is without cause and said attachment is made only to annoy and put the defendants to trouble and expense; and the defendants say that said attachment is greatly excessive and out of proportion to any amount that can possibly be recovered in said suit.

Wherefore the defendants apply to this honorable court for a reduction of the amount of said attachment, and pray that as speedily as possible a hearing may be had and such order made in the premises as may to your honors appear proper.

JOSEPH J. BURNS,
ROBERT TARR,
By their attorneys, BENJ. F. BUTLER,
E. J. HADLEY.

23 COMMONWEALTH OF MASSACHUSETTS, *Essex*, } ss:

Supreme Judicial Court.

CLERK'S OFFICE, *December* 20, *A. D.* 1881.

Upon the foregoing petition ordered that the petitioners give notice to Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman, plain-

tiffs in the above-entitled cause, to appear before our said court, at the court-house, in Boston, in our county of Suffolk, on the twenty-sixth day of December instant, at nine o'clock in the forenoon, by causing them to be served with an attested copy of said petition and of this order of court thereon forthwith, that they may then and there show cause, if any they have, why the prayer of said petition should not be granted.

Attest: ALFRED A. ABBOTT, *Clerk.*

The foregoing is a true copy of petition and order of court thereon
Attest: ALFRED A. ABBOTT, *Clerk.*

BOSTON, *December* 21, 1881.

We hereby accept service of the within order of notice for said plaintiffs.

W. F. & W. S. SLOCUM,
Their Att'ys.

Copy of Order of Court. Filed Dec. 28, 1881.

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } *ss:*

JULIUS W. ROSENSTEIN *et al.*
v.
JOSEPH J. BURNS *et al.* } In Equity.

24 This case came on to be heard upon motion at chambers, in Boston, this 26th day of December, A. D. 1881; and, by consent of counsel, it is ordered that John I. Baker, Esq., of Beverly, county of Essex, be appointed receiver to receive all the personal property belonging to the Union Fish Company which was attached upon the writ in this case, and to cause the same to be put in good and proper condition for sale, if he shall deem best to do so, before sale, and to sell and dispose of the same in such manner as shall be for the best interests of all concerned, and collect and receive the proceeds of such sales, and collect and receive from the several persons and firms named as trustees in said writ the goods, effects, and credits of said company in their hands or the goods, effects, and credits attached upon said writ, and to keep and hold the same subject to the further order of this court, depositing the moneys received therefor in the registry of said court and subject to its orders and decrees in this case.

And it is further ordered that the parties in this case are enjoined from intermeddling with said property or collecting or disturbing the same, except as directed by said receiver in writing, until the further order of this court, and that upon the delivery of said personal property to said receiver it is ordered that the attachment of the same shall be dissolved, excepting as to such of said property as has been taken from the office, making the same upon a writ of replevin; this order not to affect said attachment, so far as

it is upon the property replevied, and that said attachment be dissolved upon the two vessels of the defendants, their tackle, apparel, and furniture, which were attached upon said writ. The
25 attachment is to remain upon the real property until the further order of the court.

W. A. FIELD, *J. S. J. C.*

Dec. 27, 1881.

Demurrer to Amended Bill. (*Filed in State Court April* 29, 1882.)

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' amended bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer show that it appears by said bill that the same is exhibited by said complainants against these said defendants for several distinct matters and causes, and by reason of such distinct matters said bill is drawn out to great length, and these defendants are compelled to take copy of the whole thereof, and by joining distinct matters together which do not depend on each other, proceedings in the progress of said suit would be intricate and prolix, and said distinct matters are for several distinct causes of action, many of which are remedial at law, between the parties, and for many of them the plaintiffs have full and complete remedy at law, and that the defendants ought not to be held to answer to several distinct causes and thus be put to unnecessary charges and expenses.

Wherefore, and for divers other errors and imperfections appearing in the said bill, these defendants humbly pray the judgment of this honorable court whether they shall be compelled to make any answer to such parts of the said bill as is so demurred unto as aforesaid.

By his attorney, BENJ. F. BUTLER.

I do hereby certify that I am of opinion, upon examination of the foregoing demurrer, that there is such probable ground in law therefor as to make it a fit subject for judicial inquiry and trial, and that it is not intended merely for delay.

BENJ. F. BUTLER, *Of Counsel.*

26 *Copy of Petition for Removal into C. C. of U. S. Filed April* 24, '82.

COMMONWEALTH OF MASSACHUSETTS, *Essex,* } *ss.:*

Supreme Judicial Court. In Equity.

JULIUS W. ROSENSTEIN *et al.*
v.
JOSEPH J. BURNS *et al.*

To the honorable the justices of the supreme judicial court:

Respectfully represent Joseph J. Burns and Robert Tarr, the

defendants in the above cause, that at the time of the commencement of this suit they were and ever since have been and still are residents and citizens of the State of Massachusetts, and the plaintiffs then were and ever since have been and still are residents and citizens of the State of New York; that the amount in controversy in said suit exceeds, exclusive of costs, the sum of five hundred dollars, the same being the sum of several thousand dollars; and now come your petitioners, at the term of this court at which said cause could be first tried and before trial thereof, and pray that said suit may be removed from this court into the circuit court of the United States, next to be holden at Boston, in and for the district of Massachusetts, according to the statute in such case made and provided; and your petitioners offer herewith the bond required by said statute and pray that all further proceedings in this court may be stayed.

JOSEPH J. BURNS.
ROBERT TARR.

April 24, 1882.

27 *Copy of Bond.*

Know all men by these presents that we, Joseph J. Burns and Robert Tarr, both of Gloucester, in the county of Essex and Commonwealth of Massachusetts, as principals, and Francis W. Homans, of said Gloucester, as surety, are holden and stand firmly bound unto Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman, all of the city, county, and State of New York, in the sum of five hundred dollars; to the payment of which to the said Julius, Leo, and Henry or their executors, administrators, or assigns we hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

The condition of the obligation is such that whereas the said Joseph J. Burns and Robert Tarr have this day petitioned the supreme judicial court in and for the county of Essex and State of Massachusetts for the removal of a certain cause therein pending in equity, wherein the said Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman are plaintiffs and the said Joseph J. Burns and Robert Tarr are defendants, to the circuit court of the United States in and for the district of Massachusetts:

Now, therefore, if after the granting of said petition the said Joseph J. Burns and Robert Tarr shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

28 In witness whereof we hereunto set our hands and seals this twenty-fourth day of April, A. D. 1882.

JOSEPH J. BURNS. [SEAL.]
ROBERT TARR. [SEAL.]
F. W. HOMANS. [SEAL.]

Signed and sealed in presence of—
CHAS. A. BROWN.
WILLIAM CRONIN to F. W. H.

And now, upon the foregoing petition, the same having been duly considered, it is ordered that the said suit be, and the same is hereby, removed from this court into the circuit court of the United States for the district of Massachusetts, next to be holden at Boston, in said Commonwealth.

By the court:

ALFRED A. ABBOTT, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS, *Essex*, } ss:

I, Alfred A. Abbott, clerk of the supreme judicial court for said county of Essex, do certify that the foregoing are true copies of the writ and all other papers on file and of the proceedings and of the record in the action of Julius W. Rosenstein *et al. v.* Joseph J. Burn *et al.* & trustees, entered at the April term of said court, 1882, and by the order of said court removed to the circuit court of the United States.

In witness whereof I hereunto set my hand and affix the [L. S.] seal of said supreme judicial court this twelfth day of May, in the year of our Lord one thousand eight hundred eighty-two.

ALFRED A. ABBOTT, *Clerk.*

29 After entry in this circuit court this cause came on to be heard on the demurrer of defendants to the amended bill on the twenty-second day of July, A. D. 1882, the Honorable Thomas L. Nelson, district judge, sitting.

On the twenty-fifth day of September, A. D. 1882, the following petition was filed:

Complainants' Petition for Order for Receiver to Pay Moneys into Court.
(*Filed Sept.* 25, 1882.)

The plaintiffs in the above-entitled cause respectfully represent that by the order of the supreme judicial court in and for the county of Essex and Commonwealth of Massachusetts, duly made before the removal of said cause to this honorable court, John I. Baker, of Beverly, in said county, was duly appointed receiver in this cause, and by said order he was required to deposit the moneys which should be received by him as such receiver in the registry of the court, as by the copy of said order returned to and entered in this honorable court in this cause and here referred to will more fully appear, and that it was there considered and understood that said receiver should be required to so deposit said money, instead of being required to give a bond with sureties, as is usual in such cases and for the security of all parties in interest; that said receiver hath re-

ceived a large amount of money from the sources mentioned in said order, the exact amount of which these plaintiffs are now unable to state, but they believe that the same amounts to about ten thousand dollars; that said moneys were received by said receiver for the most part several months since, and these plaintiffs have
30 requested him to pay the same into this honorable court or into the clerk's office thereof, but he hath neglected and still neglects so to do.

Wherefore said plaintiffs pray that said John I. Baker, as receiver as aforesaid, be ordered and required by this honorable court to deposit said moneys so received by him, as receiver as aforesaid, in this honorable court or with the clerk thereof, and for such further orders as the circumstances of the case may require.

By their att'ys and solicitors, W. F. & W. S. SLOCUM.

Upon the aforesaid petition the following agreement was indorsed:

Agreement.

It is agreed between the parties that the money shall be paid in and the account of the receiver be filed by the 11th of December next.

BENJ. F. BUTLER,
For Defendants and Receiver.
W. F. & W. S. SLOCUM,
For Pl'ffs.

This cause was thence continued to the October term of this court, A. D. 1882, when, on the twenty-fourth day of October, A. D. 1882, the opinion of the court was announced, and in accordance therewith the demurrer to the amended bill was overruled.

On the sixteenth day of November, A. D. 1882, the following answer to amended bill was filed by defendants:

31 *Defendants' Answer* (*Filed Nov.* 16, 1882.)

And now come the defendants and, not admitting each and every allegation in said bill of complaint, but denying the same, except as hereinafter specifically admitted, admit that the contract was made between said plaintiffs and defendants, a copy of which is annexed to said bill of complaint and marked A.

And the defendants, further answering, admit that the plaintiffs and defendants entered into the business mentioned in said contract, but the defendants deny that the plaintiffs kept or performed any part of or either of the stipulations by them to be kept or performed, or advanced any of the sums of money mentioned in said contract at the times therein set forth or at any time, or that they have expended of their own money any such sums as in said bill set forth, except such as has been derived from said business; and the defendants, answering, aver that said plaintiffs have realized

much larger sums from said business than in said bill set forth, and the defendants deny that any balance is due the plaintiffs from or on account of said business; but, on the contrary, the defendants aver that there is a balance due the defendants on account of said business.

And the defendants, further answering, deny that any just claims whatever have been made against said plaintiffs for or on account of any goods made by said defendants; but, on the contrary, the defendants aver that the plaintiffs have sold other goods not made by the defendants, which last before-mentioned goods were of an
32 inferior quality and sold by the plaintiffs as and for goods made by the defendants and under their mark and designation, so that great injury has come to the reputation of the goods made by the defendants.

And the defendants, further answering, aver that they have kept and performed said fifth article of said contract substantially and fully, and that said books have at all times been open to the inspection and examination of said plaintiffs, and that their said factory has been run during all the time covered by said agreement and until the commencement of the suit under the direction and supervision of an employee employed by said plaintiffs.

And the defendants, further answering, say that they have kept and performed said sixth article of said agreement fully and substantially and have not neglected said business, but, on the contrary, have carried on the same properly and in good faith, as it was for their interest so to do.

And the defendants, further answering, say that they have fully and substantially kept and performed said seventh article, and that they have put up all their goods in a good and workmanlike manner so as to be merchantable, as it was for their interest to do, and if any of said goods were found unmerchantable it was because of the failure of said plaintiffs to furnish suitable cans and materials by which said goods were to be put up or to furnish said cans and materials with sufficient promptness and in sufficient quantities so that the mackerel and other fish could be put up while fresh and without unreasonable delay, and if any fault can be found with the manner in which said goods were put up or with said goods
33 it was because of the negligence, unskillfulness, or ignorance of the foreman of said business who was sent there by said plaintiffs to superintend and direct the same.

And the defendants, further answering, say that they have kept and performed and have not broken said thirteenth and fifteenth articles of said agreement, as in said bill alleged, or either of them.

And the defendants, further answering, say that they have kept and performed said twenty-eighth article of said agreement fully, and have allowed the said plaintiffs, by their chosen servant, to take supervision and direction in said factory, and have never denied to said plaintiffs the right to co-operate with them, as in said bill is alleged.

And the defendants, further answering, deny each and every allegation in said bill that they have negligently and carelessly con-

ducted said business in any manner or form, as in said bill alleged; but said defendants admit that they have purchased cans other than those furnished by said plaintiffs.

And the defendants, further answering, say that it was the duty by said contract of said plaintiffs to furnish a sufficient number of cans so that the fish might be packed when fresh, but that said plaintiffs neglected to furnish said cans, and that some fish spoiled for want of cans furnished by said plaintiffs in time that they might be seasonably canned; and the defendants say that because they could not obtain cans from said plaintiffs they did purchase large quantities of cans from other parties in order to preserve, in so far as they might do, fish purchased by them from being spoiled from want of canning

34 And the defendants, further answering, say that they employed all help that was needed or profitable for canning said fish, and that all fish purchased by them would have been preserved and canned if cans had been seasonably furnished by said plaintiffs, as was their bounden duty under said contract to do.

And the defendants, further answering, deny each and every allegation in said bill of any false pretences whatever made by them to induce said plaintiffs to enter into said agreement or said business, and pray that they may have the same advantage of this their answer as if they had pleaded specifically to saidallegations of false pretences.

And said defendants admit that true it is that they have purchased some fish in Boston, because the fish could be purchased cheaper in said Boston than at said Gloucester at the times they were purchased; all of which was done in good faith, for the best interests and profits in said business, as it was for the defendants' own interest to do.

And the defendants, further answering, say that they are of sufficient financial ability to pay any or all losses of said business, present or prospective; and, further, that upon a just and fair account of said business being taken, and upon a just recoupment from said plaintiffs being had by the defendants for the losses in said business by the acts, doings, and neglect of the plaintiffs to perform their stipulations and covenants in said contract, a large sum would be due from said plaintiffs to said defendants arising from said business.

And the defendants, further answering, say that said plaintiffs without cause published a notice that they would no further carry on the business under said contract, and that they by

35 public notice dissolved, violated, and put an end, so far as they could, to the same; and the defendants are entirely willing and desirous that all business connections between them and the plaintiffs should be dissolved and forever ended because of the dishonest, fraudulent, and unjust conduct and violations of said contract by the plaintiffs.

Wherefore the defendants pray that said bill may be dismissed,

and that they may be discharged thereof with their reasonable and proper costs.

By their attorneys, BENJ. F. BUTLER.
E. J. HADLEY.

On the fourteenth day of December, A. D. 1882, the following replication was filed:

Replication. (*Filed Dec.* 14, 1882.)

The replication of Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman, complainants, to the answer of Joseph J. Burns and Robert Tarr, defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in law to be answered to by said defendants, and that the said answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied to by these repliants, without that, that any other matter or thing in the said answer contained materially or effectually in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by said bill they have already prayed.

36

By their solicitors, W. F. — W. S. SLOCUM.

On the thirteenth day of January, A. D. 1883, the Honorable Thomas L. Nelson, district judge, sitting, the following order of court was entered:

Order of Court. (*Jan.* 13, 1883.)

NELSON, *J.*:

Ordered, That the receiver in this cause, John I. Baker, of Beverly, in this district, file in this court an account as such receiver, and deposit in the registry of this court the funds in his hands as receiver, on or before eleven o'clock Saturday, Jan. 20, 1883, or show cause at that time why he should not file such account and make such deposit.

By the court:

JOHN G. STETSON, *Clerk.*

37 On the twentieth day of January, A. D. 1883, the Honorable Thomas L. Nelson, district judge, sitting, the following order of court was entered:

ducted said business in any manner or form, as in said bill alleged; but said defendants admit that they have purchased cans other than those furnished by said plaintiffs.

And the defendants, further answering, say that it was the duty by said contract of said plaintiffs to furnish a sufficient number of cans so that the fish might be packed when fresh, but that said plaintiffs neglected to furnish said cans, and that some fish spoiled for want of cans furnished by said plaintiffs in time that they might be seasonably canned; and the defendants say that because they could not obtain cans from said plaintiffs they did purchase large quantities of cans from other parties in order to preserve, in so far as they might do, fish purchased by them from being spoiled from want of canning

34 And the defendants, further answering, say that they employed all help that was needed or profitable for canning said fish, and that all fish purchased by them would have been preserved and canned if cans had been seasonably furnished by said plaintiffs, as was their bounden duty under said contract to do.

And the defendants, further answering, deny each and every allegation in said bill of any false pretences whatever made by them to induce said plaintiffs to enter into said agreement or said business, and pray that they may have the same advantage of this their answer as if they had pleaded specifically to saidallegations of false pretences.

And said defendants admit that true it is that they have purchased some fish in Boston, because the fish could be purchased cheaper in said Boston than at said Gloucester at the times they were purchased; all of which was done in good faith, for the best interests and profits in said business, as it was for the defendants' own interest to do.

And the defendants, further answering, say that they are of sufficient financial ability to pay any or all losses of said business, present or prospective; and, further, that upon a just and fair account of said business being taken, and upon a just recoupment from said plaintiffs being had by the defendants for the losses in said business by the acts, doings, and neglect of the plaintiffs to perform their stipulations and covenants in said contract, a large sum would be due from said plaintiffs to said defendants arising from said business.

And the defendants, further answering, say that said plaintiffs without cause published a notice that they would no further carry on the business under said contract, and that they by

35 public notice dissolved, violated, and put an end, so far as they could, to the same; and the defendants are entirely willing and desirous that all business connections between them and the plaintiffs should be dissolved and forever ended because of the dishonest, fraudulent, and unjust conduct and violations of said contract by the plaintiffs.

Wherefore the defendants pray that said bill may be dismissed,

and that they may be discharged thereof with their reasonable and proper costs.

By their attorneys, BENJ. F. BUTLER.
E. J. HADLEY.

On the fourteenth day of December, A. D. 1882, the following replication was filed:

Replication. (*Filed Dec.* 14, 1882.)

The replication of Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman, complainants, to the answer of Joseph J. Burns and Robert Tarr, defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in law to be answered to by said defendants, and that the said answer of the said defendants is very uncertain, eva-
36 sive, and insufficient in law to be replied to by these repliants, without that, that any other matter or thing in the said answer contained materially or effectually in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by said bill they have already prayed.

By their solicitors, W. F. — W. S. SLOCUM.

On the thirteenth day of January, A. D. 1883, the Honorable Thomas L. Nelson, district judge, sitting, the following order of court was entered:

Order of Court. (*Jan.* 13, 1883.)

NELSON, *J.*:

Ordered, That the receiver in this cause, John I. Baker, of Beverly, in this district, file in this court an account as such receiver, and deposit in the registry of this court the funds in his hands as receiver, on or before eleven o'clock Saturday, Jan. 20, 1883, or show cause at that time why he should not file such account and make such deposit.

By the court:

JOHN G. STETSON, *Clerk.*

37 On the twentieth day of January, A. D. 1883, the Honorable Thomas L. Nelson, district judge, sitting, the following order of court was entered:

Order of Court. (*Jan.* 20, 1883.)

NELSON, *J.*:

By consent of counsel it is ordered that John I. Baker, Esq., receiver in this cause, may retain the sum of thirty-three hundred and fifty dollars from the moneys in his hands as receiver, and therefrom pay to the several persons and firms named in the schedule hereto annexed the amount therein set against their several names and any other creditors of the Union Fish Company that both parties or their counsel shall, in writing, direct to be paid, provided they shall accept the same in full satisfaction of their respective claims against the Union Fish Company of Gloucester, in said district, on or before Thursday, the 25th day of January current, and that said Baker make return upon a copy of this order of his doings thereon, with an account, and pay such part of the aforesaid sum of $3,350 as shall not have been paid to and received by said creditors as aforesaid, and his expenses concerning the same, to the clerk or register of said court before eleven o'clock a. m. on the 27th day of January current.

By the court:

JOHN G. STETSON, *Clerk.*

38 *Schedule.*

Names of creditors to be paid.	Amounts to be paid each.
S. Van Norden	$481 50
Nickerson & Baxter	108 65
N. B. Campbell	201 25
H. B. Newhall	8 60
Masury, Young & Co.	11 25
Cunningham & Thompson	23 24
Peter Carlton	2 50
Wm. Hodgkins	3 30
A. H. Tuck	1 28
N. Babson & Co.	5 33
Fernwood Lake Ice Co.	34 22
Dolliver Bros.	140 60
Stockbridge & Co.	9 62
Gloucester Steamboat Co.	12 25
Honnors Bros.	186 39
John G. Bennet	398 43
Harvey & Parr	25 95
F. M. Loring	73 42
Nathan Richardson	129 00
George E. Hall	2 00
J. O. Procter	15 15
I. C. Mayo	611 92
Bennet Griffin & Son	169 42
Frederick L. Stacey	26 67
John Clark	118 13

39 On said twentieth day of January, A. D. 1883, said John I. Baker, receiver, filed his account and paid into the registry of this court the sum of five thousand four hundred and six dollars and seventy-five cents ($5,406.75).

On the seventeenth day of February, A. D. 1883, the said John I. Baker, receiver, filed an additional account and paid into the registry of this court the sum of six hundred and ninety-eight dollars and eighty-five cents ($698.85).

On said seventeenth day of February, A. D. 1883, the following agreement was filed:

Agreement. (*Filed Feb.* 17, 1883.)

It is hereby agreed that John I. Baker, Esq., receiver in this case, may pay out of the moneys retained by him with which to pay certain creditors of the Union Fish Co. under order of court dated January 20, 1883, to N. B. Campbell the sum of seven hundred and three $\frac{25}{100}$ dollars, instead of the sum of $201.25 mentioned in schedule annexed to said order, provided said Campbell accepts the same in full satisfaction of all his claims against said Union Fish Company, and provided the same be settled and paid within the time mentioned in said order, and so as not to delay the return of said order and amount thereon within the time mentioned therein.

W. F. & W. S. SLOCUM,
Of Counsel for Pl'ffs.
E. J. HADLEY,
Of Counsel for Def'ts.

On the above agreement was afterwards written the following receipt:

40 *Receipt.*

Jan. 25, 1883, received of John I. Baker, receiver, seven hundred and three $\frac{25}{100}$ dollars, in accordance with the above order, in full of all claims against the Union Fish Company of Gloucester.

N. B. CAMPBELL.

On said seventeenth day of February, A. D. 1883, the following agreement, to which was prefixed a copy of the order of court entered Jan. 20, 1883, was filed:

Agreement. (*Filed Feb.* 17, 1883.)

BOSTON, *January 26th*, 1883.

We hereby consent and agree that the time for the payment of the sums mentioned in the foregoing order and the return of said order may be extended three weeks from the times in said order mentioned.

W. F. & W. S. SLOCUM,
Of Counsel for Plaintiffs.
E. J. HADLEY,
Of Counsel for Defendants.

The following receipt was annexed to said agreement:

41 *Receipt.*

Names of creditors to be paid.	Amounts to be paid to each.	Received of John I. Baker, Esq., receiver, the amount set against our respective names, in full of our several claims against the Union Fish Co. of Gloucester, Mass.
E. Van Norden	$481 50	E. Van Noorden, per How.
Nickerson & Baxter	108 65	Nickerson & Baxter.
N. B. Campbel	201 25	
H. B. Newhall	8 60	Herbert B. Newhall.
Masury, Young & Co.	11 25	Masury, Young & Co., per W. C. B.
Cunningham & Thompson	23 24	Cunningham & Thompson, per F. A. Pearce.
Peter Carlton	2 50	Peter Carlton, by C. B.
Wm. Hodgkins	3 30	Wm. Hodgkins, by C. B.
A. H. Tuck	1 28	A. H. Tuck, by C. B.
N. Babson & Co.	5 33	N. Babson & Co.
Fernwood Lake Ice Co.	34 22	F. W. Homans, ag't, by Wm. Cronin.
Dolliver Bros.	140 60	Dolliver Bros., by W. T. D.
Stockbridge & Co.	9 62	Stockbridge & Co.
Gloucester Steamboat Co.	12 25	Abbot Coffin.
Honners Bros.	186 39	Honners Brothers.
John G. Bennet	398 43	John G. Bennett, Jr.
Harvey & Tarr	25 95	Harvey & Tarr.
F. M. Loring	73 42	F. M. Loring.
Nathan Richardson	129 00	
George E. Hall	2 00	Geo. E. Hall, by C. B.
J. O. Procter	15 15	Joseph O. Procter, Jr.
I. C. Mayo	611 92	
Bennet Griffin & Son	169 42	Bennett Griffin.
Frederick L. Stacey	26 67	Fred'k L. Stacey, by C. B.
John Clark	118 13	John Clark, by R. C.

42 On the twenty-fourth day of March, A. D. 1883, the following officer's motion to amend return was filed:

Officer's Motion to Amend Return. (*Filed March* 24, 1883.)

And now comes George Lane, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, deputy sheriff in and for said county and the officer who served the writ in the above-entitled cause, and moves that he may be allowed to amend his return thereon by striking from the schedule marked "A," annexed and referred to in and made a part of said return, the words "schooner Gazell and the schooner Excelsior."

And the said George Lane says that said words "schooner Gazell and schooner Excelsior" were written in said schedule through inadvertence and mistake, and the above-proposed amendment would make said return conform and be according to the facts.

GEORGE LANE,
Deputy Sheriff.

UNITED STATES OF AMERICA.

COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

MARCH 24TH, A. D. 1883.

Then personally appeared the above-named George Lane and made oath that the foregoing statement by him subscribed is true, before me, the subscriber, a notary public in and for said county.

Witness my hand and notarial seal.

[SEAL.] WINGFIELD S. SLOCUM,
Notary Public.

43 On the twenty-first day of April, A. D. 1883, the Honorable Thomas L. Nelson, district judge, sitting, the following order of reference of this cause to a master was entered:

Order of Reference to a Master. (*April* 21, 1883.)

On reading the pleadings in the above-entitled cause and hearing the counsel of the respective parties and on consideration thereof it is ordered that it be referred to George P. Sanger, Esq., as a master of this court, to hear the parties and their evidence and report as to all issues of fact made by the pleadings in said cause and to take an account of the dealings and transactions between said parties and all claims for damages arising out of said transactions.

By the court:

JOHN G. STETSON, *Clerk.*

This cause came on to be further heard upon the officer's motion to amend return, the Honorable Thomas L. Nelson, district judge sitting; and thereupon it was ordered, to wit, April 21, 1883, that the motion of the officer, George Lane, to amend his return by striking out of Schedule A, annexed to the writ, the names of the schooners Gazelle and Excelsior, was allowed. Thereupon, on the third day of May, A. D. 1883, the following amendment of officer's return on writ was filed:

Amendment of Return on Writ. (*Filed May* 3, 1883.)

44 Amendment of George Lane, deputy sheriff, of his return on the writ in said cause by leave of said court.

I, George Lane, the deputy sheriff who made attachment on the writ in said cause, by virtue of the leave granted me by said court April 21st, A. D. 1883, do hereby amend my return on said writ by striking out from the schedule marked "A," referred to in said return and made a part thereof, the words "schooner Gazelle and schooner Excelsior."

GEORGE LANE,
Deputy Sheriff.

April 23, 1883.

This cause was then continued from term to term to the May term of this court, A. D. 1884, when, to wit, September 18, 1884, upon the approval of counsel for both parties and of the master, the sum of thirteen hundred and twenty-eight dollars ($1,328) was paid out of the fund in this cause in the registry of this court to J. M. W. Yerrenton for services in reporting evidence before the master herein.

This cause was thence continued from term to term to this present October term, A. D. 1885, when, to wit, October 16, 1885, the following report of special master is filed :

45 *Report of Special Master.*

The plaintiffs in this case are Julius W. Rosenstein and Leo Rosenstein, of the city of New York, doing business therein under the name of Rosenstein Brothers, and Henry Sellman, of New York. The defendants are Joseph J. Burns and Robert Tarr, of Gloucester, Mass., doing business as copartners at Gloucester under the firm name of J. J. Burns & Co.

Rosenstein Brothers, Henry Sellman, and J. J. Burns & Co. composed the Union Fish Company of Gloucester.

The proceedings in this case were originally commenced in the supreme judicial court of the State, and were removed to this court by the defendants by *certiorari*, and were entered here at the May term, 1882. The original proceedings were dated Nov. 7, 1881, and consisted of a bill in equity, inserted in a writ of attachment, in which the officer was directed to attach the property of the defendants to the value of $20,000, and to summon them to appear at the rules at the clerk's office, Salem, on the first Monday of December, 1881. Certain persons were also named in the writ to be summoned as trustees of the defendants, and they were so summoned. At the rules, Dec. 5, 1881, the defendants filed an answer.

Dec. 19, 1881, the plaintiffs filed an amended bill, in which, charging misconduct on the part of the defendants, they pray for
46 the dissolution of the partnership, the appointment of a receiver, and for an injunction against the defendants.

The defendants also filed their petition to the court, in which they allege, among other things, that the suit is without cause and the attachment excessive, and pray that the amount of the attachment may be reduced and for other relief. Upon this petition the court, Dec. 20, 1881, directed that the plaintiffs be ordered to appear at chambers, at Boston, and show cause, if any they have, why the prayer of the petition should not be granted, and they appeared as notified.

The following order of court (in substance) was filed in said cause Dec. 28, 1881 : "This cause came on to be heard upon motion at chambers, in Boston, Dec. 26, and by consent of counsel it is ordered that John I. Baker, Esq., of Beverly, in the county of Essex, be appointed receiver to receive all personal property belonging to the Union Fish Company which was attached upon the writ in this case, and to cause the same to be put in good and proper condition for sale, if he shall deem it best to do so, before sale, and to sell and

dispose of the same in such manner as shall be for the best interests of all concerned, and collect and receive the proceeds of such sales, and collect from the several persons and firms named as trustees in said writ the goods, effects, and credits of said company in their hands or attached on said writ, and to keep and hold the same subject to the further order of this court, depositing the money received therefor in the registry of said court and subject to its orders and decrees in this case; and it is further ordered that the parties in this case are enjoined from intermeddling with said property or collecting or disturbing the same, except as directed by said receiver, in writing, until the further order of this court; and that upon the delivery of said personal property to said receiver it is ordered that the attachment of the same shall be dissolved, excepting as to such of said property as has been taken from the officer making the same upon a writ of replevin; this order not to affect said attachment, so far as it is upon the property replevied; and that said attachment, be dissolved upon the two vessels of the defendants, their tackle, apparel, and furniture which were attached upon said writ. The attachment is to remain upon the real property until the further order of this court."

47 Mr. Baker accepted the appointment as receiver and at once proceeded to act under it, and has filed an account in this court and has paid moneys received and collected by him as receiver into the registry of this court.

To the plaintiffs' amended bill, filed in the State court Dec. 19, 1881, the defendants, April 29, 1882, in that court, filed their demurrer for multifariousness and want of equity; both of which grounds were overruled in this court Oct. 24, 1882. The defendants filed their answer to the amended bill Nov. 16, 1882, in which they deny the allegations of misconduct charged against them by the plaintiffs, and themselves charge misconduct on the part of the plaintiffs, and say "the defendants are entirely willing and desirous that all business connections between them and the plaintiffs should be dissolved and forever ended, because of the dishonest, fraudulent, and unjust conduct and violation of said contract by the plaintiffs."

On the 14th December, 1882, the plaintiffs filed their replication.

On the 21st April, 1883, the case was referred to George P. Sanger, as special master, with directions "to hear the parties and their evidence, and report as to all issues of fact made by the pleadings in said cause, and to take an account of the dealings and transactions between said parties and all claims for damages arising out of said transactions."

The order of submission came to me as special master May 19, 1883.

In the autumn of that year both parties were before me on the matter of taking testimony on the part of the plaintiffs by depositions, and the depositions of many witnesses on the part of the plaintiffs were taken under commissions issuing out of the court, and such depositions were used at the hearing.

The case came on to a hearing before me Feb. 21, 1884, on the amended bill and the answer thereto, and for thirty-four days dur-

ing the residue of that month and during the spring and summer of that year, from time to time, at their mutual convenience, I heard the parties and their evidence and arguments.

By consent of parties the oral testimony was taken by a stenographer and was written out by him, the expense to be paid out of the fund in court. His bill therefor, amounting to $1,328, approved by counsel and the master, has been paid from that fund.

48 When, in the course of the hearing, the examination of the books was reached, it was agreed by the parties to the suit that Mr. Adolph Goldmark, book-keeper of the plaintiffs, and Mr. James C. Alden, expert book-keeper and accountant, who on the part of the defendants had examined their books and those of the plaintiffs, should together go over the books of both plaintiffs and defendants and draw up from them a statement of the condition of the Union Fish Company of Gloucester at the time the suit was brought, and also from the same books should prepare statements showing the indebtedness or otherwise of the plaintiffs and of the defendants to the said Union Fish Company, as indicated by said books, giving the undisputed items of the account and the disputed items in separate columns. They went over the books together and prepared such statements, which are subscribed by them and are hereto annexed and marked "A^1," "A^2," and "B."

They made a division of the accounts at Nov. 5, 1881, probably supposing that the suit was commenced and the attachment made on that day. It was not commenced until Nov. 7, 1881. This difference of two days does not appear in any way to affect the account. What was true of Nov. 5, 1881, was equally true of Nov. 7 of that year.

Messrs. Goldmark and Alden also prepared in the same way a summary of the receiver's account and of the machinery account, which, subscribed by them, are subjoined to this report, marked "C" and "D."

After the testimony was finished and before the arguments, at my request, the counsel for the plaintiffs and defendants, respectively, formulated their respective statements of the damages which the alleged misconduct of the other party had been to them and to the Union Fish Company and their respective claims of damages therefor.

These claims, given in full, are subjoined and marked "E" and "F."

Exhibit No. 515, referred to at the end of "E," is the statement "G" hereto subjoined.

The plaintiffs and the defendants also, respectively, drew up a statement of their view of the condition of the Union Fish Company and the respective claims of the plaintiffs and defendants thereon and the amounts due to and from them, respectively.

49 These statements are subjoined, marked "G" and "H."

With this statement of the case and of the course of proceedings under the reference I come now to state my further action under the order of reference to me as special master.

I.—The issues of fact raised by the pleadings.

By the pleadings the making of the contract annexed to the bill and marked "A" was and is admitted, and it is admitted that the plaintiffs and defendants entered into the business named in said contract. Substantially everything concerning the performance of the contract and the conduct of the parties in the performance of their duties and obligations under the contract was in dispute. Some of these matters became of little importance, as they affected the propriety of dissolving the partnership (which was subsequently assented to) rather than the question of damages, no general or special damage being claimed therefor.

It should be borne in mind that the agreement was originally oral, and was made in the latter part of April or beginning of May, 1881, and that the parties worked under this until the 8th or 9th of July of the same year, when the contract A, annexed to the bill, was executed.

The main issue of fact raised by the pleadings is the conduct of both plaintiffs and defendants in regard to the partnership business. The plaintiffs charged gross misconduct and negligence on the part of the defendants in various specified particulars. This charge the defendants denied in all respects and particulars, and they made substantially the same charge against the plaintiffs, which the plaintiffs denied; and these allegations and denials raise the issue of fact as to misconduct and negligence by both parties.

Upon this general issue I find, upon a full and fair consideration of the whole testimony, that there is no sufficient evidence to establish the misconduct or negligence of either plaintiffs or defendants. On both sides there was ignorance and inexperience in the proper method of conducting the business contemplated by the partnership agreement, and there was a manifest distrust and lack of harmony between the partners, and the business was not successful, especially the fish guano business; but both plaintiffs and defendants, in their way, labored diligently, and, as they thought, in the best way, to make both branches of the business successful. Neither plaintiffs nor defendants had any knowledge or experience in the manufacture of fish guano. In the canning of mackerel neither of the defendants knew anything of the business when they engaged in it (and this fact was at the time known to the plaintiffs), although one of the defendants (Capt. Tarr) had had experience in the catching of mackeral and preserving them fresh for market. One of the plaintiffs, Mr. Sellman, had some experience the previous year in canning herring at Camden, Maine, working for or with Rosenstein Brothers, and that year and previous years had put up sardines, a different process from putting up herring. Rosenstein Brothers had experience in the sale and distribution of canned goods.

II.—Account of the dealings and transactions between said parties.

In stating this I will consider the accounts which the parties presented before me, and will take up first the account of Burns & Co. against the Union Fish Company, being account marked "A²."

Nov. 5, 1881, there was an admitted balance due Burns & Co. from the Union Fish Company of $1,274 70

Of the disputed claims I disallow entirely the claim of Burns & Tarr for labor of $1,250, as by the sixth article of the contract they were to devote all necessary time to the interests of the business generally.

I allow in full the claim for payment on account of well, July 10, 1881 ..... 300 00

As to the dory and oars, safe, stove, office desk, and letter press:

These were all the property of and were used by J. J. Burns & Co. (Burns & Tarr) before the Union Fish Co. was established. They were used by J. J. Burns & Co. in their separate business while the Union Fish Company was in existence, and they remained in the possession of J. J. Burns & Co. after the Union Fish
51 Company was dissolved. There is no sale nor agreement for a sale to the Union Fish Company shown, and no charge for any of these items was made by J. J. Burns & Co. until after this suit was brought. The various articles were, however, used to a greater or less extent during that season for the business of the Union Fish Company, and that company should pay some compensation for said use; and I find that a proper compensation therefor is as follows:

For the use of the dory and oars	$15 00	
Safe	8 00	
Stove	3 00	
Office desk	5 00	
Letter press	30	
		31 30
Amount due and paid to Nov. 5, 1881		$1,606 00

Bills contracted prior to but paid after Nov. 5, 1881:

Of these I allow the item—

Sundry accounts undisputed $68 33

Use of horse and buggy:

The use of this was proper in the prosecution of the business of the Union Fish Company, but the amount claimed is too large. I allow 150 00

Travelling on account of the factory:

This charge is for sums of money actually paid out by Mr. Tarr for travelling expenses when on the business of the Union Fish Company. Mr. Tarr testified that he kept memoranda of amounts expended from time to time, which memoranda were lost, but their aggregate exceeded the sum claimed; that there were one or more trips to New York and two trips to Maine, and that the travel was necessary for the business of the factory. I find that the travel was necessary and the amount claimed properly chargeable, and allow the whole thereof 150 00

52 C. Brown, salary $416 67
" extra services 200 00

$416 67

Mr. Brown was a young man and the book-keeper of J. J. Burns & Co., and he also, while the business of the Union Fish Company was going on, kept part of the books of the factory and wrote the letters to the New York parties, either himself or at the dictation of Mr. Burns or Mr. Tarr, and prepared the cash statements. Fifty dollars a month for not exceeding six months would be good compensation for these services. Besides these services, however, he rendered other services during the hurried seasons of labor in handling the fish before they were canned, and afterwards in packing the cans and handling the cases, for which he should be paid. No charge was made the Union Fish Company for these services until after this suit was brought. I think it will pay Mr. Brown sufficiently for his services to the Union Fish Company to allow his charge for services and disallow the extra. I allow 416 67

Paid for water privilege, $500:

After the failure of the "artesian well," so called, J. J. Burns & Co. agreed with one Edward Burns that he should furnish water for the factory for five years at $100 a year. It was said there was some writing, but none was produced, and the nature of the writing, if any, did not appear. Only $100 was paid in 1881. I allow this sum; the rest I disallow 100 00

Legal expenses in well case, $70 + $50 = .. $125 00
Judgment in well case 666 24

$791 24

This is a proper charge against the Union Fish Company and is allowed 791 24

Paid Richardson, balance of account, $260:

This is a proper charge and is allowed 260 00

Total allowed, contracted before, but paid after Nov. 5, 1881 ..... $1,936 24

53 Bills contracted and paid after Nov. 5, 1881:

Of these bills I allow the first item—

"Rent of building for attached goods ..... $191 63"

—because it is not disputed. I should not otherwise consider it a proper charge by J. J. Burns & Co. against the Union Fish Company, because it is a part of the expenses incident to this suit, and for this reason I do not allow the disputed item of $91.63.

Total allowed for bills contracted and paid after Nov. 5, 1881 ..... $191 63

Summary of allowed claims of J. J. Burns & Co. against the Union Fish Company:

Amounts due and paid to Nov. 5, 1881	$1,606 00
Amount contracted before but paid after Nov. 5, 1881	1,936 24
Amount contracted and paid after Nov. 5, 1881	191 63
Total	$3,733 87

Of the claims against the plaintiffs by J. J. Burns & Co., as shown on page 17 of the book entitled "Record," a printed copy of which is hereto annexed, marked "F," I disallow the whole in the form they are made. I have numbered the items of the claim from 1 to 16, inclusive.

Item 1 is allowed in part in my statement of the account of J. J. Burns & Co.

Item 2 I do not find supported by the evidence in the case.

Item 3. Loss in consequence of failure of Rosenstein Brothers to buy salt mackerel, etc.

This is founded upon a claim that Rosenstein Brothers agreed to furnish Burns & Co. with money to buy salt mackerel to hold for a rise. This forms no part of the agreement annexed to the bill. There was no proof of any agreement or even talk with Rosenstein Brothers as to this. There was some talk with Henry Sellman about such a project, and Burns and Tarr testified that he agreed that Rosenstein Brothers should furnish the money for such a purpose; but Sellman had no authority to bind Rosenstein
54 Brothers in such a matter, and he denied that he ever made such an agreement. The conversation between Burns and Tarr and Sellman was some time before the execution of the agreement A, annexed to the bill—July 9, 1881. I find nothing in the correspondence touching such an agreement, nor do I find this matter set up in the answer.

Items 4, 5, 6, and 7 are for prospective profits, and cannot be allowed.

Items 8 and 9 are not sustained by the testimony in the case.

Items 10, 11, 12, and 13. Burns & Co., soon after the attachment, occupied the premises leased to the Union Fish Company for their own business and repossessed themselves of their estate therein. There was a substantial surrender of the term by the Union Fish Company and an acceptance thereof by J. J. Burns & Co.

Items 14, 15, and 16—claims for interest—are disallowed.

I take up now the account of Rosenstein Brothers with the Union Fish Company, being account marked "B."

Claims due and paid to Nov. 5, 1881:

Nov. 5, 1881, there was an admitted balance due Rosenstein Bros. of		$21,480 98
I allow the disputed claim of amounts paid by them to their customers—reclamations for bad mackerel	$1,908 93	
Less claim for non-delivery	31 80	
		1,877 13
		$23,358 11

Defendants contended that much of this bad fish was not manufactured at Gloucester, but was made at Camden, Maine, by the plaintiffs and fraudulently charged upon the defendants. This accusation is not sustained by the evidence. Canned fish made at Camden by or for the plaintiffs and sent to them at New York for sale was there found to be bad, was placed one side, and afterwards, when the plaintiffs were sending back to Gloucester from New York fish canned at Gloucester and found to be bad, many of the cans of fish made at Camden were by misake sent to Gloucester with the cans of bad
55 fish made at Gloucester; but the reclamations allowed as above include nothing for fish canned elsewhere than at Gloucester and by the defendant.

Total balance Nov. 5, 1881	$23,358 11

Bills contracted prior to but paid after Nov. 5, 1881:

The amount undisputed and therefore allowed is	$2,116 55
Of the disputed items I allow the charge for compensation, twenty-five cents a can, under article 18 of the agreement	1,424 67
And also the item of travelling expenses one-half year under the same 18th article	500 00

And I disallow the claim for interest, $736.24.

Total amount allowed that was contracted before and paid after Nov. 5, 1881	$4,041 22

Bills contracted and paid after Nov. 5, 1881:

Sundry undisputed claims are allowed	$107 65
Of the disputed claims I allow—	
Discounts on collections for cash	140 84
These original sales were made for cash upon future delivery, conditioned that if the market price should fall before delivery the amount of the fall should be deducted.	
E. Guttentag, for boxes to take the place of those made useless by the bad goods	3 45
Compensation for balance of shipments under art. 18 of the agreement	717 38
Total allowed	$969 32

I disallow the claims for interest, $138.30, $1,511.92, $1,474.94, and for travelling for one-half year, $500. I also disallow the claim for $1,680.53, paid after attachment. A part of this was paid to the sheriff and a part is for expenses incident to the suit. No part is an indebtedness of the Union Fish Company.

Summary of amounts allowed Rosenstein Bros. as due from the Union Fish Company.

56	Balance of Nov. 5, 1881	$23,358 11
	Contracted before and paid after Nov. 5, 1881	4,041 22
	Contracted and paid after Nov. 5, 1881	969 32
	Total	$28,368 65
	From which deduct amount sales 2,540 cases fish	13,934 43
		$14,434 22

Of the claims for damages by the plaintiffs against the defendants, as they appear in statement E, I disallow the whole. Item No. 1, machinery account, I treat of on page 14 of this report, when considering the question of the assets of the Union Fish Company.

Items Nos. 2, 3, 4, and 6, so far as they are supported by any proof, are not a legal claim against the defendants. The loss in these several items, whatever it was, was that of the Union Fish Company, and was not legally chargeable to the defendants.

Item 5 is the same amount and matter that are put in the account A[1], signed by Messrs. Alden and Goldmark, as a claim of J. J. Burns & Co. for compensation for labor, and is by me disallowed in that account. I must hold it to be a claim for labor, as agreed upon by the parties before me.

In regard to the items 7, 8, and 9, so far as item 8 speaks of payments that should be made by J. J. Burns & Co. for losses by reason of their representations and conduct, I find, as already stated, that there are no such payments to be made.

As to the other questions in said items 7, 8, and 9, they are not included in the order of reference to me, and I therefore decline to pass upon them.

I find upon the proofs before me that the liabilities of the Union Fish Company are—

To J. J. Burns & Co.	$3,733 87
To Rosenstein Bros.	14,434 22
Total due Burns & Co. and Rosenstein Bros.	$18,168 09

It was also shown that there was pending in the superior court for the county of Essex a suit, the writ in which is dated Nov. 19, 1883, in which Israel C. Mayo, of Gloucester, is plaintiff and the plaintiffs and defendants, under the style of the Union Fish
57 Company, are defendants, in which the plaintiff Mayo seeks to recover of the defendants the sum of $1,279.40, which claim was contested by the defendants, and the suit was still pending. The defendants filed a declaration in set-off in the case, in which they claimed of the plaintiff $2,450. No other claim upon or liability of the Union Fish Company was shown before me.

The defendants introduced evidence tending to show that cans for packing the fish and solder could have been procured in Boston in the summer and fall of 1881 at less price than Rosenstein Brothers charged the Union Fish Company for similar cans and solder, and also that the fish could have been sold in Boston that season for a higher price than Rosenstein Brothers in their accounts returned that they had obtained; and the defendants claimed that these overcharges for cans and material and the differences in the prices of the fish should be charged to the plaintiffs.

The partnership agreement, article 3, made it the duty of Rosenstein Brothers to furnish all material at cost, and to sell the manufactured goods at best obtainable market prices. The testimony showed that they made their purchases and sales in the exercise of their best judgment, and, as they thought, for the best advantage of the Union Fish Company; that they charged only the actual cost of the material to the Union Fish Company, and that the prices obtained by them for the manufactured goods were the best they could obtain therefor. I am of the opinion that this claim of the defendants should not be allowed.

Assets of the Union Fish Company.

The assets of the Union Fish Company consist of the fund in court, paid in by the receiver, and other funds, if any, in his hands. There is a summary of the receiver's account, marked "C," annexed to this report, signed by Messrs. Alden and Goldmark, but I have not undertaken to verify it. The receiver is an officer of the court and subject to its orders, and no duty devolves upon me in reference to his account.

The plaintiffs contend that, under the ninth and tenth articles of the partnership agreement, the machinery account, a memorandum
58 of which, signed by Messrs. Alden and Goldmark and marked "D," is annexed to this report, less ten per cent. deducted

under the ninth article, is a valid claim against the defendants, and is an asset to that amount of the Union Fish Company.

The principal grounds of this claim are, in substance, that under these articles of the partnership agreement the defendants became liable for the whole of the machinery account, because they did not, within a reasonable time after the dissolution, elect not to take it and notify their copartners of such election, and also because a large part of the articles properly charged to the machinery account were annexed to the real estate of J. J. Burns & Co., which was mortgaged by them without notice to the mortgagee of the contract between the plaintiffs and the defendants as to this machinery account and without the consent of Rosenstein Brothers, and that this was equivalent to a conversion of all such fixed machinery to their own use.

In fact, the defendants did not formally elect not to take the machinery account and notify the plaintiffs of their election, and it was in evidence that the mortgagee notified the sheriff soon after the attachment not to remove any fixtures from the mortgaged premises.

This claim of the plaintiffs cannot be sustained. The construction they put upon the ninth and tenth articles of the partnership agreement is inadmissible, and as to the claim of conversion, it is not established. The plaintiffs had actual or constructive notice of the mortgage, and that the fixtures were placed upon the mortgaged premises, and they made no objection thereto.

The claim of the plaintiffs was that the machinery account as a whole should be charged to the defendants at its cost, less the ten per cent., and they made no claim as to, and offered no evidence of the value of, any particular item or items making up the account. There was proof that some of the fixtures had been, after the dissolution, severed from the realty by the defendants, with the consent of the mortgagee, and were stored on the premises, but there was no testimony before me as to their value. It was also in evidence that after the dissolution the defendants, with the consent of the mortgagee, took down the oven in which was the broiler, and that the plaintiffs, ascertaining this, offered the defendants, in substance, to take the broiler and pay seventy-five per cent. of its cost, and deposit
59 the amount in court or with the receiver to await the result of this suit, and that the defendants did not accept the proposition or do anything about it. The cost of the broiler was not shown.

As to the tools forming part of this machinery account, whatever of them were attached by the sheriff would, in accordance with the order of the court, go into the hands of the receiver. It was not shown before me whether there were any tools belonging to the Union Fish Company that were not attached in this suit, nor was any testimony offered as to the value of any tools.

A remaining asset is the twenty-three cases of mackerel in the hands of the plaintiffs in New York, as appears by the summary of the Union Fish Company, statement A[1].

There was no proof before me of the condition of these mackerel, nor that they had any value. I cannot, therefore, place any value upon them.

I must, therefore, find upon the proofs before me that the only

appreciable assets of the Union Fish Company are the fund in court and the money and property, if any, in the hands of the receiver.

By the twenty-first and twenty-second articles of the partnership agreement A, the net profits of the business are to be shared and the losses borne by the plaintiffs and defendants in the proportion of five-eights by the plaintiffs and three-eights by the defendants.

Respectfully submitted.

GEO. P. SANGER,
Special Master.

60 A[1].

Union Fish Co.

		Undisputed.	Disputed.	Total.
1881. Nov. 5	Due Rosenstein Brothers to Nov. 5 ---- A	$21,480 98	$1,908 93	$23,389 91
	Due J. J. Burns & Co. to Nov. 5 ---- B	1,274 70	1,718	2,992 70
	Balance to Nov. 5, 1881 ----	$22,755 68	$3,626 93	$26,382 61
	Due Rosenstein Brothers; items contracted prior to Nov. 5, '81; paid since ---- A	2,116 55	2,660 91	4,777 46
	Due J. J. B. & Co.; do. do. ---- B	68 33	2,567 91	2,636 24
	Total balance to Nov. 5, 1881	$24,940 56	$8,855 75	$33,796 31
	Due Rosenstein Brothers; items contracted after November 5, '81, and paid since ---- A	107 65	4,486 72	4,594 37
	Due J. J. Burns & Co. ---- B	191 63	91 66	283 29
		$25,239 84	$13,434 13	$38,673 97
	Due sundry creditors; since paid by receiver ----	2,651 15	----	2,651 15
		$27,890 99	$13,434 13	$41,325 12
	Due Rosenstein Brothers; cash paid to sheriff for expenses after attachm't ---- A	----	1,680 53	1,680 53
		$27,890 99	$15,114 66	$43,005 65
	Total balance as p'r books ----	Dr.	----	43,005 95

Union Fish Co. Summary Ac't.

Total liabilities ----	----	----	$43,005 65
Assets:			
Sales by R. Bros. after attachment ----	----	$13,934 43	
Collected by receiver; sales of J. J. B. & Co. ----	----	3,439 81	
Proceeds of sale by receiver ----	$6,117 15	----	
Less expenses ----	800 21	5,316 94	22,691 18
Deficit, against which machinery % is to be accounted for, & 23 cases mackerel are on hand in N. Y. ----	----	----	$20,314 47

Approved August 6th, 1884.

JAMES C. ALDEN.
ADOLPH GOLDMARK.

63 C.

Summary of Receiver's Account.

Dr.		Cr.	
To cash collected from sales by Burns	$3,439 81	By expenses, services	$800 21
" cash, proceeds of auction sale	6,117 15	" payments to sundry creditors	2,651 15
		" cash paid into court	5,406 75
		" balance	698 85
	$9,556 96		$9,556 96
To balance due from receiver	$698 85		

D.

Memorandum of Machinery Account.

Represented in J. J. B. & Co.'s books by the following accounts:		Represented in R. Bros.' books by machinery account	$8,090 90
Fixtures	$5,485 48	Difference (presumably items not explained in cash sheets)	728 56
Tools	1,365 22		
Construction account	1,968 76		
	$8,819 46		$8,819 46
		Total balance on machinery account	$8,090 90

Approved August 6, 1884.

JAMES C. ALDEN.

Approved August 6, 1884.

ADOLPH GOLDMARK.

64 E.

Specification of Plaintiffs' Claim.

Rosenstein Brothers claim that J. J. Burns and Co. should pay the following sums of money, to wit:

Item No. 1. The amount of machinery account	$8,819 46	
Less 10 per cent. under arts. 9 and 10 of contract	881 95	
		$7,937 51
2. Also for discrepancy between charges of fish purchased and fish canned, 200,000, at 60c. a hundred		1,200 00

3. Also for 256 cases 3-lb. oval cans of mackerel which were bad and unmerchantable, and dumped, returned, or thrown away, at $6 a case	$1,536 00	
And 37 cases 2-lb., at $4.50 a case	166 50	
		$1,702 50
4. Also that they should pay the account which Rosenstein Brothers have had to pay for bad and unmerchantable goods sold	$1,908 93	
Less $31.80 allowed for damages for non-delivery of goods	31 80	
		1,877 13
5. Cash drawn out of Union Fish Co. by J. J. Burns and Rob't Tarr		1,250 00
		$13,966 64
Less the balance found by the amount agreed by amount of Goldmark & Alden		1,534 66
		$12,431 98

6. Rosenstein Bros. further claim that J. J. Burns & Co. should account and pay for a large amount of cans furnished and shipped to them for the Union Fish Co., which have not been accounted for by them. The more full statement of the number and amount of the discrepancy in the account of cans furnished and used will be found in the vouchers and evidence in the case, and will be put in form hereafter but it is now believed the same will amount to one thousand dollars or thereabonts.

7. Rosenstein Brothers further claim that the balance in hands of the registry of the court, after deducting therefrom such sums and charges as shall be taken therefrom, should be paid over to them.

8. Also that the balance of the sum of $20,507.84 due to them, as per statement above, after the payment of the money in the hands of the register of the court to them and the payment of the aforesaid sum of $12,431.98 due from J. J. Burns, as above stated, should be paid by J. J. Burns & Co. as a part of their losses by reason of their representations and conduct complained of and proved.

9. But if said J. J. Burns & Co. shall not be required to pay all of the aforesaid sums and losses, then they should be required to pay three-eighths of the balance due plaintiffs over and above such sums as shall be found due from and required to be paid by the defendants and the sum that shall be paid to the plaintiffs from the moneys in the hands of the register of the court, and they refer to the statement filed, being Exhibit No. 515,* as a form of account.

W. F. & W. S. SLOCUM,
Of Counsel for Pl'ffs.

* For Exhibit No. 515 see "G," page 12.

65 F.

Claims Against R. Bros. by Burns & Co.

Item No. 1.	Burns & Co., advances to the U. F. Co.		$6,010 14
2.	" ⅜s of p. and loss ac. of $23,746.99		8,909 12
3.	Burns & Co., loss in consequence of failure of R. Bros. to buy salt mackerel, Burns & Co. having storage for 5,000 brls., at $4 per brl., gain $20,000, ⅜s		7,500 00
4.	1882. Union Fish Co. should have packed 15,000 cases fish at a profit of $2.00 per case, or $30,000, ⅜s is		11,250 00
5.	1883. Same		11,250 00
6.	1884. Same		11,250 00
7.	1885. Same		11,250 00
8.	In consequence of the acts of the R. Bros. the Mess. Burns & Co. were ruined in credit (for 1882), and their business was entirely destroyed and their actual investment of over		30,000 00
	Was a total loss.		
9.	A low estimate of said business would be		10,000 00
10.	Rent of factory premises 1 year, from Nov. 5, 1881, to Nov. 5, 1882	$1,200 00	
11.	Same to Nov. 5, 1883	1,200 00	
12.	" " " 5, 1884	1,200 00	
13.	" " " 5, 1885	1,200 00	
			4,800 00
14.	Interest on advances $6,010.14 / " " ⅜s profit & loss 8,905.12 } from Nov. 5, 1881, to Aug. 5, 1884 (2 9/12 yr.)		2,461 02
15.	Interest on rent of 1882 (1 yr. 9 ms.)	$126 00	
16.	Interest on rent to Aug. 5, 1884 (9 ms)	54 00	
			180 00
			$114,860 28

66 G.

EXHIBIT 515.

Union Fish Co.

To balance deficit as shown by Alden & Gk.	$20,314 47
Less disputed items of Burns & Co.	4,377 57
Net amount charged U. F. Co. (leaving out J. J. B. & Co.'s disputed items)	$15,936 90

		Dr.	Cr.
To balance as above	------	$15,936 90	
Credit U. F. Co. and charge J. J. Burns & Co. machinery account	$8,819 46		
Less one year wear and tear	881 95		
		------	$7,937 51
Discrepancy in fish: 200,000 fish at 60c.	------	------	1,200 00
Spoiled goods removed from cases in N. Y., 256 cases, 3 lbs., at 6	$1,536 00		
37 cases, 2 lbs., at 4½	166 50		
		------	1,702 50
Claims paid by R. Bros.	$1,908 93		
Less claim for non-delivery	31 80		
		------	1,877 13
			$12,717 14
Net loss:			
⅜ R. Bros.	$2,012 35		
⅜ J. J. B. & Co.	1,207 41		
		------	3,219 76
		$15,936 90	$15,936 90

J. J. Burns & Co.

By balance undisputed	------	------	$1,534 66
To machinery account	$8,819 46		
Less wear and tear	881 95		
		$7,937 51	
To m'f'g account: Discrepancy in fish— 200,000 at 60c.	------	1,200 00	
To blowers taken from cases in N. York—			
256 cases, 3 lbs., at 6	$1,536 00		
37 cases, 2 lbs., at 4.50	166 50		
		1,702 50	
To claims for blowers paid by R. Bros.	------	1,877 13	
To their share of loss, ⅜ of 3,219.76	------	1,207 41	
		$13,924 55	
To balance due from J. J. B. & Co. to R. Bros.	------	------	12,389 89
		$13,924 55	$13,924 55

67 G—Continued.

Account of Rosenstein Brothers.

		Disputed.	Undisputed.
Nov. 5, 1881.	By balance undisputed	------	$21,480 98
" " "	" " disputed—		
	Claims for spoiled mackerel	$1,908 93	
	By bills contracted prior and paid after Nov. 5, 1881—		
	Undisputed, sundry items	------	2,116 55
	Disputed, interest to Nov. 5, 1881	736 24	
	Compensation for handling 5,538½ cases, 25c. per case (article 18, contract), and 227 bbls.	1,424 67	
	Travelling expenses half year.	500 00	
	By bills contracted and paid after Nov. 5, 1881:		
	Undisputed, sundry items	------	107 65
	Disputed:		
	Interest Nov. 5 to Dec. 31, 1881	138 30	
	Discount on collections	140 84	
	Interest to Dec. 31, 1882	1,511 92	
	E. Guttentag, cases for repacking goods	3 45	
	Interest to Dec. 31, 1883	1,474 83	
	Compensation on 2,869½ cases, balance of shipment	717 38	
	Travelling half year	500 00	
	Paid to sheriff and for expenses after attachment	1,680 53	
		$10,737 09	
	Total of undisputed items	------	$23,705 18
	Less sales of 2,540 cases fish	------	13,934 43
	Undisputed balance	------	$9,770 75
	Add disputed items	------	10,737 09
	Total balance as agreed upon with Alden	------	$20,507 84
	By balance as above	------	$20,507 84
	Less their share of loss	------	2,012 35
			$18,495 49

To be paid as follows:		
By J. J. B. & Co	$12,389 89	
" receiver	698 85	
" money in court	5,406 75	
	$18,495 49	

68 H.

Statement of the Union Fish Co. of Gloucester.

Presented by defendants.

(The references by pages are to the book entitled "Record.")

Assets:		
8,408 cases fish shipped to New York (p. 15)	------	$62,796 84
Mdse. as ac. stock (pp. 11, 12, 13)	------	13,817 07
Machinery ac., viz:		
Fixtures (p. 13)	$5,208 48	
Tools (pp. 11, 12, 13)	1,166 04	
Construction ac., per ledger	1,968 76	
		8,620 28
Bills receivable, viz:		
Stephen Dodd & Co	$5 53	
Slade, Gorton & Co	488 53	
J. Pew & Son	706 00	
Clark & Somes	2,239 75	
		3,439 81
Claims against R. Bros. (overcharges) (p. 14)		2,912 40
		$91,586 40
Liabilities:		
Due Rosenstein Bros. (p. 10)	$56,953 92	
Bills payable assumed and paid by R. Bros.	2,224 20	
		59,178 12
Due Burns & Co. (p. 16)	$3,275 99	
Bills payable assumed and paid by B. & Co.	2,636 24	
Interest on Burns & Co.'s advances (p. 16)	97 91	
		6,010 14
Bills payable, per receiver's ac.		2,651 15
		$67,839 41
Profit and loss		23,746 99
		$91,586 40

69 On the 22d of September, 1885, having completed the foregoing report, I sent a printed copy thereof to the counsel for the plaintiffs and for the defendants, with a letter, of which the following is a copy:

BOSTON, *Sept.* 22, 1885.

I enclose a copy of my draft report as special master in the case of Rosenstein *et al. v.* Burns *et al.*

I shall retain the same until Tuesday, the 6th of October proximo, before filing it in court.

Yours very truly, GEORGE P. SANGER,
Special Master.

I have received no communication from the defendants or their counsel.

On the 5th of October I received the following from the counsel for the plaintiffs:

Objections of Plaintiffs to Draft of Report of Special Master.

First objection.—For that said special master in and by said draft of report finds and reports that the only appreciable assets of said Union Fish Company are the fund in court and the money and property, if any, in the hands of the receiver, whereas said special master ought to have found and certified in said report that he found that the amount of the machinery account, less ten per cent. to be deducted therefrom under the ninth article of the copartnership agreement, a copy of which is annexed to the plaintiffs' bill, marked "A," is an asset of said Union Fish Company, according to the schedule marked "D," "memorandum of machinery account," annexed to said redraft of report.

Second objection.—For that said special master in and by his said draft of report finds and reports that the defendants ought not to be charged with said machinery account, less ten per cent. to be deducted therefrom under said ninth article in said agreement, whereas they ought to be charged with the same under said agreement; for that they have not declined to take the same under said article tenth of said agreement or made known that they so
70 declined, and for that they so annexed a large part of the same to their real estate that the same became a part of the reality as against a grantee or mortgagee, without notice of the agreement aforesaid, and did mortgage said real estate, with said machinery so annexed to the same as to be a part thereof, as against the mortgagee, without informing said mortgagee of the terms of the agreement aforesaid between these plaintiffs and said defendants, and conveyed the same to secure their individual indebtedness, and made the same to enhance the value of their individual real estate, and so placed the same as that it could not be disposed of "to the best advantage for mutual account," as required by article tenth in said agreement, if the defendants did not assume said machinery account as therein provided, and for that the defendants did, with

the consent of said mortgagee, take down the oven and did keep the same, and did elect to retain the same, and did refuse to let the plaintiffs have the same upon payment of seventy-five per cent. of the cost thereof, the funds to be paid into the hands of the receiver or the court for the mutual benefit of the said Union Fish Company; and for that the defendants did, by their acts aforesaid, elect to assume for their own account balance of machinery account, and by all of their acts and doings in the premises are now estopped to say that they did not elect to assume the same and are estopped to say that they declined to assume the same under said articles nine and ten of said agreement, and by their own individual acts and for their own individual benefit and without the consent of the plaintiffs have rendered it impossible to have the articles charged to said machinery account disposed of to best advantage for mutual account, as required by said agreement, and especially by said articles ninth and tenth thereof.

Third objection.—For that said special master in and by said report finds that the cost of said oven, to wit, said broiler, was not shown, whereas evidence as to the same was uncontradicted that the bill of Knowlton Brothers, Exhibit No. 329, which was admitted and allowed as a part of the disbursements of the plaintiffs for and on account of the Union Fish Company, was for castings for said oven, amounting to $167.64, and the bill of E. W. Russemm for blacksmithing, being Exhibit No. —, amounting to $93.33,
71 was for sectional oven frames, and the bill of S. H. Hunt for $49.66 was for iron framework of oven, as appears by said exhibits and the testimony reported on p. 97 of book 12 and book 11, p. 17, of stenographer's report of the evidence, and the other evidence and admissions of the parties and the agreement of the expert accountants of both parties, which are referred to; and the plaintiffs pray that the evidence upon this subject may be reported to the court; and also the bill of H. & W. Alden for $30.62 was for iron used in said oven, as appears by said bill of H. & W. Alden, Exhibit No. —, and the testimony upon pp. 2 and 3 of book 13 of stenographer's report of the evidence in said case and said exhibits, which the plaintiffs pray may be reported with said report.

Fourth objection.—For that special master in and by said draft of report finds and reports that the only appreciable assets of said Union Fish Company are the funds in court and the money and property in the hands of the receiver, if any, whereas he ought to have found and reported that the articles purchased with the moneys charged to machinery account or a large part thereof are assets of said Union Fish Company in the hands of the defendants; and if the defendants are not chargeable with the amount of said machinery account, less ten per cent. deducted under the ninth article in said agreement, and that the same is a valid claim against the defendants under said articles 9th and 10th, are assets of the Union Fish Company, to be disposed of under said article 10th of said agreement to the best advantage for mutual account of the plaintiffs and defendants; and if by reason of the annexing of any of said articles purchased with the moneys charged to said machinery ac-

count having been annexed to the freehold of the defendants, and by them mortgaged, as hereinbefore mentioned, the same cannot be thus disposed of to the best advantage for mutual account of the plaintiffs and the defendants, then the same should be charged to the defendants, and such charge and the liability of the defendants therefor should be and is an asset of said Union Fish Company.

Fifth objection.—For that said special master in and by said draft of report disallows the claims of the plaintiffs against the Union Fish Company for interest on the capital of the
72 plaintiffs invested in the business of said Union Fish Company, viz., $138.30, $11,511.92, $1,474.92, claims by the plaintiffs for interest, and all claims of the plaintiffs for interest on money advanced by them for and on account of said Union Fish Company, whereas, under said copartnership agreement between the plaintiffs and defendants, and especially by the seventeenth article thereof, the plaintiffs are entitled to interest on the capital invested by them in said business at the rate of six per cent. per annum, and, as appears by the findings of said special master, they had invested a large amount of capital in said business and advanced the same for the use and benefit of said Union Fish Company, for which they are entitled to interest as aforesaid.

Sixth objection.—For that said special master in and by said draft of report disallows the claim of the plaintiffs for $1,680.53, paid after the attachment and the whole of the same, whereas said amount was laid out and expended in finishing the goods and putting them in a marketable state, which were afterwards taken and sold by the receiver under order of court and by consent of parties and the proceeds paid into court by the receiver for the benefit of said Union Fish Company and for repairing and putting its property in proper condition for sale and enhancing the value thereof and the proceeds of the same, and the money the plaintiffs so advanced in said proceeds have been paid into court for the benefit of said Union Fish Company, and in equity and good conscience the same ought to be allowed to the plaintiffs.

W. F. & W. S. SLOCUM,
Of Counsel for Plaintiffs.

I have fully considered the objections and requests named in said communication, and must decline to change my report, and therefore make the foregoing my final report.

GEORGE P. SANGER,
Special Master.

Boston, Oct. 16, 1885.

73 On the seventh day of December A. D. 1886, at the rules, in the clerk's office, the report of the special master is confirmed under equity rule 83. On the 15th day of December, A. D. 1885, upon the agreement of counsel duly filed, the sum of nine hundred and twenty dollars and fifteen cents ($920.15) is paid out of the fund in this cause in the registry of this court to George P.

Sanger, special master, for his services herein. On the third day of May, A. D. 1886, the following petition of James C. Alden is filed:

Petition of James C. Alden. (*Filed May* 3, 1886.)

The petition of James C. Alden respectfully shows unto this honorable court that he is by occupation a book-keeper and accountant; that he was employed by the parties in said cause as an expert accountant to examine the books and accounts of said parties, and prepare statements relating to the same, and to testify relating to the same at the hearing of said cause before the special master appointed by the court in said cause; that he examined said books and accounts and prepared said statements at the request of said parties and said special master for use at the hearing of said cause before said special master; that he rendered services in said cause as aforesaid from February to September, 1884, and there is due him therefor the sum of one thousand dollars ($1,000).

Wherefore he prays this honorable court to order that the register of said court pay to him said sum of one thousand dollars for his services as aforesaid out of the moneys paid into the hands
74 of said register by the receiver in said cause.

JAMES C. ALDEN.

DISTRICT OF MASSACHUSETTS, *Suffolk County,* } ss:

Subscribed and sworn to this first day of May, 1886, before me—
[SEAL.] EUGENE J. HADLEY,
Notary Public.

On the sixth day of May, A. D. 1886, the following agreement is filed:

Agreement. (*Filed May* 6, 1886.)

It is agreed that an order may be entered that the attachment on the writ in the above-entitled cause be reduced to the sum of five thousand dollars.

W. F. & W. S. SLOCUM,
Plaintiffs' Solicitors.
E. J. HADLEY,
Of Counsel for Defendants.

Upon the filing of the aforesaid agreement the Honorable Le Baron B. Colt, circuit judge, sitting, the attachment on the writ in this cause is reduced by the court to the sum of five thousand dollars.

On said sixth day of May, A. D. 1886, the Honorable Le Baron B. Colt, circuit judge, sitting, the following decree is entered:

Decree. (*May* 6, 1886.)

75 This cause came up to be further heard at this term, and was argued by counsel, and thereupon and upon considera-

tion thereof, to wit, May 6, 1886, it is ordered, adjudged, and decreed as follows, viz., that the plaintiffs are entitled to the money in the registry of this court to the credit of this cause, amounting to the sum of thirty-seven hundred and thirty-three dollars and forty cents; and it is further ordered, adjudged, and decreed that said sum of $3,733.40 be paid from said registry to the plaintiffs or W. F. & W. S. Slocum, their solicitors of record in this cause; and it is further ordered, adjudged, and decreed that the said plaintiffs are entitled to recover of said defendants the further sum of sixteen hundred and seventy-nine dollars and fourteen cents, together with interest thereon from the date of the writ in this cause, to wit, from the seventh day of November, A. D. 1881, to the date of this decree, and their costs of this suit to be taxed: and it is further ordered, adjudged, and decreed that the said defendants pay to the said plaintiffs the said sum of $1,679.14, together with interest thereon from the date of said writ, to wit, from the 7th day of November, A. D. 1881, amounting to the sum of four hundred and fifty-two dollars and eighty cents, said principal sum of $1,679.14 and interest amounting in the whole to twenty-one hundred and thirty-one dollars and ninety-four cents, and costs of this suit to be taxed; and it is further ordered, adjudged, and decreed that said plaintiffs have execution against said defendants for said sum of $2,131.94 and costs of this suit to be taxed as aforesaid, with interest thereon from the date of this decree, according to the course and practice of this court.

By the court:

JOHN G. STETSON, *Clerk.*

76 From the aforesaid decree the defendants in open court claim an appeal to the Supreme Court of the United States, and it is ordered by the court that said appeal be allowed upon the filing by the defendants of a sufficient appeal bond.

On the twenty-eighth day of May, A. D. 1886, the following report of clerk on taxation of costs is filed:

Report of Clerk on Taxation of Costs. (*Filed May* 28, 1886.)

A hearing upon the bill of costs submitted by complainants and annexed hereto has been had before the clerk, Mr. Slocum appearing for complainants and Gen. Butler and Mr. Hadley appearing for defendants, with the following results:

Items 1, 2, 5, 6, and 7 are allowed without objection.

Items 3 and 4 are allowed without objection, to be paid from the fund in court, according to understanding between counsel before the decree of May 6, 1886, was entered.

Item 8, attorney fee in cause, $20, is allowed. Gen. Butler objects to the allowance of this item, if an attorney fee in the State court is allowed as part of item 18.

Item 9, attorney fees on 32 depositions for complainants, amounting to	$80
Attorney fees on 8 depositions for defendants, amounting to	20
Total	$100

It is agreed that these depositions were taken in the cause and used before the master. This item 9 is allowed. Gen. Butler objects to the allowance of item 9, but, as I do not understand the ground of his objection, I leave it to be stated orally to the court.

77 Items 10, 11, 12, 13, and 14 are fees for taking depositions used before the master. The several magistrates who took these depositions have certified to their fees, either upon the depositions or in bills presented therefor, and the complainants have paid the same as certified or charged. I return herewith the bills and receipts relating to the same. Gen. Butler objects to all these fees as excessive, and I understand this to be his only objection. Acting as clerk upon a bill of costs presented, I cannot revise the fees certified to by officers acting under the laws of the United States or under the special authority of the court. I do not therefore pass upon the objection that these fees are excessive, but I allow items 10 to 14 as fees of officers of the court sufficiently certified to and paid.

Items 15 and 16. Gen. Butler objects to the allowance of these items on the ground that A. Goldmark and F. J. Sellman are parties to the cause or so interested in the result of the cause as to be treated as parties. The papers in the cause do not disclose such relation, and no evidence thereof was submitted to me. I overrule this objection and decide that the witnesses named are entitled to proper fees. The proof as to travel and attendance which is submitted to me is not sufficient. Either the master should certify to these fees, or they should be more specifically stated and sworn to, or the parties should agree that they are correct. There is not time for a further hearing before me within the time allowed for the clerk to act upon this taxation of costs, and I therefore return the certificate of these witnesses for such action as the court may take thereon.

78 Item 17 is disallowed without objection.

Item 18 is complainants' costs in State court before removal, as certified to by the assistant clerk of that court. Four items only of this bill of costs are objected to, namely:

(*b.*) Service of writ	$631	05
(*c.*) Entry at rules	1	00
(*d.*) Entry	1	00
(*e.*) Attorney fee	2	50

Acting as clerk, I cannot go behind the certificate of the clerk of the State court, which I return herewith, and therefore allow item 18 as claimed.

As to the item (*b*) objected to (which is the principal sub-item of item 18), I find (*b*) service of writ, $631.05, duly certified to by the officer, George Lane, deputy sheriff, in his return on the writ, as shown by the copy filed in this court, and I cannot go behind this certificate, if I could properly go behind the certificate of the clerk of the State court.

Item 19 I allow upon the certificate of George Lane, deputy sheriff, filed in this court Dec. 15, 1885, to which reference is hereby made.

Gen. Butler objects to this allowance upon several grounds, among which are the following:

(1.) That the fees are unnecessary, excessive, and unauthorized.

(2.) That a deputy sheriff is not an officer authorized to make a return of fees to this court.

(3.) That no officer's fees can be taxed in this court in an equity cause for attachment of or other services in connection with the keeping of property. This objection also applies to a large part of the officer's fees included in (*b*) of item 18.

79 (4.) That the personal property attached, except the two vessels named in Schedule A of the officer's return, was partnership property belonging to the Union Fish Company, and could not be properly attached in a suit between the partners growing out of partnership affairs, and all fees arising from such attachment should be disallowed. This objection also applies to a large part of the officer's fees included in (*b*) of item 18.

Item 20 is allowed without objection.

As the hearing before me was necessarily hurried and the time allowed for making this report is short, I recommend that the complainants' counsel be permitted to restate objections orally to the court. I may not have stated the objections with sufficient particularity.

Respectfully submitted.

JOHN G. STETSON, *Clerk.*

Bill of Costs, Claimed by Complainants, Annexed to Clerk's Report.

Tr. May T., 1882, to Oct., 1885, 8 terms, @ 2.64	21 12		
Att. 8 " " 33	2 64		
		$23 76	(1)
Continuances, 7 terms, @ 30c.		2 10	(2)
Clerk's fees on deposition of cause:			
Filings, $10; docket entry, $9; docket fee, $3; decree, $1; recording, $40		63 00	(3)
80 Commission, 1 per cent., on fund paid into court		61 05	(4)
Commissions to take depositions, paid		9 00	(5)
Printing amended bill & demurrer		26 08	(6)
Paid copies order of court		1 50	(7)
Attorney fee in cause		20 00	(8)
Attorney fee on 40 depositions taken and used in the cause		100 00	(9)
Commisioners' fees taking depositions:			
Geo. L. Catlin, consul		50 00	(10)
John A. Shields, commissioner		58 50	(11)
Philip A. Hoyne, "		37 25	(12)
C. P. Celley, N. P. (including witness fees)		23 10	(13)
Edward Kurtz, commissioner			
S. D. Leavitt, N. P. (including witness fees)		18 90	(14)

Witness fees before master, as per certificate:

A. Goldmark, 1,200 miles, 13 days			(15)
F. J. Sellman, 400 miles, 3 days			(16)
1,600 miles @ .05	$80 00		
16 days " 1.50	24 00		
		104 00	
Officer's bill examining marks, &c., F. D. Gallupe		17 45	(17)
Costs taxed in State court		664 64	(18)
Officers' fees (after return of writ)		575 64	(19)

81 Witness fees, as per list:

Toombs & others (Shields, com'r), 22 miles, 11 days.			
Blaiser & others (Hoyne, com'r), 32 miles, 16 days.			
54 miles @ .05	2 70		
27 days " 1.50	40 50		
		43 20	(20)

On said twenty-eighth day of May, A. D. 1886, the parties were heard by the court, the Honorable Horace Gray, associate justice, and the Honorable Le Baron B. Colt, circuit judge, sitting, upon objections to the taxation of costs as reported by the clerk.

On said twenty-eighth day of May, A. D. 1886, the following motions are filed:

Motion that Money in Registry be Paid Over According to Decree.
(*Filed May* 28, 1886.)

To the honorable the justices of said court:

Respectfully represent the plaintiffs in the above-entitled cause that at the October term of said court for 1885, to wit, on the sixth day of May, 1886, by the consideration of the justice of said court, a final decree was entered in said cause, in which it was ordered, adjudged, and decreed, among other things, that the said plaintiffs were entitled to the money in the registry of this court to the credit of this cause, amounting to the sum of thirty-seven hundred and thirty-three dollars and forty cents ($3,733.40); and it was further ordered, adjudged, and decreed, that the said sum of $3,733.40 be paid from said registry to the plaintiffs or to W. F. & W. S. Slocum, their solicitors of record in this cause, as appears by the de-
82 cree and the record thereof in the office of the clerk of said court remaining and here referred to.

Also that said October term of said court hath adjourned without day, and that more than ten days, exclusive of Sundays, have elapsed since the making and entry of said decree, and there hath no citation been issued to the said plaintiffs, or supersedeas bond with sufficient sureties filed and approved in said cause, as required by the acts of Congress and the rules of this court and of the Supreme Court of the United States in cases of appeals in causes in equity from the final decrees of this honorable court, and these plaintiffs are en-

titled to have said decree executed and said money in the registry of this court paid to them according thereto. They therefore humbly pray that the usual order be signed for the payment of said money to them or their said solicitors, according to the terms of said decree.

By their solicitors, W. F. & W. S. SLOCUM.

Motion for Execution. (*Filed May* 28, 1886.)

To the honorable the justices of said court:

Respectfully represent the plaintiffs in the above-entitled cause that at the October term of said court for 1885, to wit, on the sixth day of May, 1886, by the consideration of the justice of said court, a final decree was entered in said cause, in which it was ordered, adjudged, and decreed, among other things, that the said plaintiffs are entitled to recover of said defendants the further sum of sixteen hundred and seventy-nine dollars and fourteen
83 cents, $1,679.14, together with interest thereon from the date of said writ in this cause, to wit, from the seventh day of November, A. D. 1881, to the date of this decree, and their costs of this suit, to be taxed; and it was further ordered, adjudged, and decreed that the said defendants pay to the said plaintiffs the said sum of $1,679.14, together with interest thereon from the date of said writ, to wit, from the seventh day of November, A. D. 1881, amounting to the sum of four hundred and fifty-two dollars and eighty cents, $452.80, said principal sum of $1,679.14 and interest amounting in the whole to twenty-one hundred and thirty-one dollars and ninety-four cents, $2,131.94, and costs of this suit, to be taxed; and it is further ordered, adjudged, and decreed that said plaintiffs have execution against said defendants for said sum of $2,131.94 and costs of this suit, to be taxed as aforesaid, with interest thereon from the date of this decree, according to the course and practice of this court, as appears by the decree and the record thereof in the office of the clerk of said court remaining and here referred to.

Also that said October term of said court hath adjourned without day, and that more than ten days, exclusive of Sundays, have elapsed since the making and entry of said decree, and there hath no citation been issued to said plaintiffs, or any supersedeas bond with sufficient sureties filed and approved in said cause, as required by the acts of Congress and the rules of this court and of the Supreme Court of the United States in order to stay execution in cases of appeals from the final decrees in causes in equity in this honorable court, and these plaintiffs are entitled to have said
84 decree executed and execution issued thereon according to said decree, and that there was an attachment upon the original writ in said cause of the real estate of said defendants, which the plaintiffs are advised and believe will be dissolved and the plaintiffs' lien thereon lost unless the same be seized on execution to be issued according to said decree within thirty days from the making thereof.

Wherefore the plaintiffs pray that execution issue upon said decree

according to the course and practice of this court, as ordered by said decree.

By their solicitors, W. F. & W. S. SLOCUM.

On the first day of June, A. D. 1886, the Hon. Le Baron B. Colt, circuit judge, sitting, the following order of court is entered:

Order of Court. June 1, 1886.

COLT, *J.*:

Upon hearing the parties upon the report of the clerk on taxation of costs it is ordered that of the items of costs claimed by the complainants—

Items 1, 2, 5, 6, and 7, amounting to		$62 44
are allowed without objection.		
Item 8, attorney fee in cause	$20 60	
" 9, " " on 40 depositions	100 00	
		120 00
are also allowed, the defendants objecting.		
Items 10, 11, 12, 13, and 14, being magistrates' fees for taking depositions	187 75	
Are allowed, after deducting from item 10 thirty-five dollars, as agreed by counsel	35 00	
		152 75
Items 15 and 16, witness' fees before master, modified by agreement of parties, are allowed as modified, amounting to		91 00
The defendants objecting.		
Item 17 is disallowed without objecting.		
Items 18 and 19 are modified so as to disallow five-eighths (⅝) of the expenses connected with the preservation and keeping of the personal property (not including vessels) attached on the writ.		
Amount of items 18 and 19	1,220 28	
Less ⅝ of $1,146.09, disallowed	716 33	
		503 95
The defendants objecting.		
Item 20 is allowed without objection		43 20
Items 3 and 4 are allowed to be paid from the fund in court without objection, $124.05.		
Total costs as allowed by the court, to be taxed in favor of complainants and against the defendants		$973 34

By the court:

JOHN G. STETSON, *Clerk.*

86 *Appeal to Supreme Court.*

The defendants claim to be heard upon a reversal of this order before the Supreme Court on their appeal to the Supreme Court, if such appeal shall be perfected.

On the second day of June, A. D. 1886, the Hon. Le Baron B. Colt, circuit judge, sitting, the petition of James C. Alden, filed May 3, 1886, is denied by the court, and thereupon the defendants claim to be heard upon a reversal of this order before the Supreme Court on their appeal to the Supreme Court, if such appeal shall be perfected.

Thereupon, on said second day of June, A. D. 1886, the said defendants gave a good and sufficient bond that they will prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, and said appeal is allowed by the court.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

87 The following is the opinion of the court in accordance with which the demurrer of the defendants to the amended bill of complaint in this cause was overruled Oct. 24, A. D. 1882.

Circuit Court of the United States, District of Massachusetts.

JULIUS W. ROSENSTEIN *et al.*
v.
JOSEPH J. BURNS *et al.*
} No. 1746, Equity Docket.

Opinion of the Court. (*October* 24, 1882.)

NELSON, *J.*:

This bill is brought to procure a dissolution and winding up of the affairs of a partnership entered into between the parties under a written agreement for the canning of fish and the manufacture of pomace and fish guano, and to continue for the term of five years from July 1, 1881. The copartnership agreement provides that the plaintiffs shall furnish the capital with which to carry on the business, and shall furnish also all materials at cost; that the defendants shall have charge of and superintend the manufacturing department at the factory in Gloucester, keep correct books and submit weekly statements of the business to the plaintiffs, make good and marketable goods at the lowest possible cost in such quantities as the plaintiffs should deem advisable, and that all goods made, except in certain specified cases, should be shipped to the plaintiffs and be sold by them in New York.

The grounds upon which the dissolution is asked for are the wilful and persistent neglect of the defendants to comply with the terms of the written agreement; that the business is being con-
88 ducted at a great loss, and that the plaintiffs were induced to enter into the partnership and contribute their capital to the

concern through certain false and fraudulent representations of the defendants as to the nature and extent of the business.

The defendants demur to the bill for multifariousness and for want of equity.

Both grounds of demurrer must be overruled. The bill states a plain case for equitable relief. A partner is under no obligation to continue a member of a partnership when his copartner persistently and wilfully violates the essential conditions upon which the contract of the partnership rests. He is not under the necessity of remaining in the firm and resorting to his action at law upon the partnership contract for redress. He is at liberty to withdraw himself and his capital from the concern whenever it becomes reasonably certain that the business can no longer be carried on at a profit, whether through the misconduct of his copartner or from a failure of the business itself; so, if he has been induced to enter into the partnership contract through the deceit of his copartner, he may withdraw whenever the fraud practised upon him becomes known. In neither case is he required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership. The bill is not multifarious. It has a simple purpose—the dissolution and winding up of the concern. Though several grounds for relief are stated, yet they arise out of the same series of transactions, relate to the same subject-matter, and can be conveniently settled in one suit. They are all properly joined in one bill.

Demurrer overruled.

89 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled Julius W. Rosenstein *et al.*, complainants, *v.* Joseph J. Burns *et al.*, defendants, lately determined in said circuit court, and of the opinion of the court filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

90 *Bond to Party on Appeal.*

Know all men by these presents that we, Joseph J. Burns and Robert Tarr, both of Gloucester, in the Commonwealth of Massachusetts, as principals, and William C. Dolliver and John S. Dolliver, both of said Gloucester, as sureties, are held and firmly bound unto

Julius W. Rosenstein and Leo Rosenstein and Henry Sellman, of the city, county, and State of New York, in the full and just sum of eight thousand dollars, to be paid to the said Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the second day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit in equity depending in said court between the said Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman, complainants, and the said Joseph J. Burns and Robert Tarr, defendants, decree was rendered against the said Joseph J. Burns and Robert Tarr, defendants; and the said defendants having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said complainants citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Joseph J. Burns and Robert Tarr, defendants, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOSEPH J. BURNS. [L. S.]
ROBERT TARR. [L. S.]
WM. C. DOLLIVER. [L. S.]
JOHN S. DOLLIVER. [L. S.]

Signed, sealed, and delivered in presence of—
JOHN G. STETSON.

Approved:
LE BARON B. COLT,
United States Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

91 *Citation.*

The United States of America to Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman, of the city, county, and State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed in a cause in equity, lately determined in the circuit court of the United States for the district of Massachusetts, entitled Julius W. Rosenstein *et al.*, complainants, *v.* Joseph J. Burns *et al.*, defendants, upon which appeal said defendants are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said defendants in said cause should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, circuit judge, this second day of June, in the year of our Lord one thousand eight hundred and eighty-six.

LE BARON B. COLT,
Circuit Judge.

BOSTON, *June 4th*, 1886.

We hereby acknowledge service of the foregoing citation on the above-named appellees.

W. F. & W. S. SLOCUM,
Solicitors for Appellees.

Endorsed on cover: Massachusetts C. C. U. S. No. 207. Joseph J. Burns and Robert Tarr, appellants, *vs.* Julius W. Rosenstein, Leo Rosenstein, and Henry Sellman. Filed October 16, 1886.

Office Supreme Court, U. S.
FILED,
MAR 17 1890

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 207.

JOSEPH J. BURNS AND ROBERT TARR,
Appellants,

v.

JULIUS W. ROSENSTEIN AND LEO ROSENSTEIN AND HENRY SELLMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLANTS.

EUGENE J. HADLEY,
BENJ. F. BUTLER,
of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 207.

JOSEPH J. BURNS ET AL., *Appellants*,

v.

JULIUS W. ROSENSTEIN ET ALS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is a suit in equity brought by Rosenstein and others against Burns and Tarr for a dissolution of a co-partnership and for an account and a settlement of its affairs. The suit was begun in the state court on November 7, 1881, and removed to the circuit court upon petition of the defendants.

The appellants, Burns and Tarr, doing business in Gloucester, Mass., under the name of J. J. Burns & Co., and the appellees, Julius W. and Leo Rosenstein, doing business in the city of New York under the name of Rosenstein Bros., and Sellman, formed the said co-partnership, under the name of the Union Fish Company, of Gloucester, Mass., for the purpose of carrying on the business of canning fish and the manufacture of fish guano.

It is shown that on or about April 22, 1881, an agreement, partly oral and partly in writing, was made between Rosenstein Bros. and Sellman and Burns and Tarr to form said co-partnership, to be known as the Union Fish Company (Record, p. 6); that the business of said partnership went on from May 1 until July 6, 1881, when the agreement was concluded in writing between the parties (Rec. p. 12, "A"); the twenty-fourth article of which agreement provides that the partnership shall continue for the term of five years, commencing May 1, 1881, and terminating April 30, 1886; that the business was carried on by the parties under said written agreement until November 5, 1881, when Rosenstein Bros. and Sellman, without any notice, claim, or demand by them on Burns and Tarr, caused a notice to be published that said co-partnership was dissolved, and on November 7 they caused a bill in equity to be inserted in a writ of attachment of that date, under the laws of Massachusetts, upon which writ, on that day and the day following, they caused all the property of Burns and Tarr, both real and personal, to be attached by the sheriff to the amount of $20,000, and also all the goods and property of the Union Fish Company, a part of which was in an unfinished condition, one moiety of which at least was the property of complainants as members of said partnership. (Rec. pp. 1, 2, 3, and 4.)

The complainants in their bill allege ten different matters and things which they claim were violations of the partnership agreement made and done by the defendants before November 5, 1881, because of which the complainants claim they were entitled to dissolve said co-partnership and sustain their bill for the purpose of dissolving the same (Rec. p. 11), and because of which, also, they claim they could and did obtain in the state court an injunction against the defendants to restrain them from intermeddling with the prop-

erty of said partnership or in any business connected with said Union Fish Company; the complainants in said bill also pray for a settlement of the affairs of said partnership and for the appointment of a receiver to take possession of all the property of said Union Fish Company, and to sell and dispose of the same, and take the whole matter in charge.

This appointment of a receiver was made in the state court on December 28, 1881. (Rec. p. 16.)

Upon petition of the defendants the cause was removed to the circuit court (Rec. p. 19), where the defendants filed an answer denying each and every allegation of the complainants' bill, and therein declaring that because of the conduct of the complainants they did not desire to have any further business connection with them.

The defendants in their answer also aver "that upon a just and fair account of said business being taken, and upon a just recoupment from said plaintiffs being had by the defendants for the losses in said business by the acts, doings, and neglect of the plaintiffs to perform their stipulations and covenants in said contract, a large sum would be due from said plaintiffs to said defendants arising from said business."

On April 21, 1883, the cause was referred to a master by order of court in the words following: —

"On reading the pleadings in the above-entitled cause and hearing the counsel of the respective parties, and on consideration thereof, it is ordered that it be referred to George P. Sanger, Esq., as a master of this court, to hear the parties and their evidence, and report as to all issues of fact made by the pleadings in said cause, and to take an account of the dealings and transactions between said parties and all claims for damages arising out of said transactions. By the court, JOHN G. STETSON, *Clerk*." (Rec. p. 27.)

The master reported as to the charges of the complainants

against the defendants of misconduct on the part of the defendants in carrying on the partnership while the same continued, in the words following: —

"The main issue of fact raised by the pleadings is the conduct of both plaintiffs and defendants in regard to the partnership business. The plaintiffs charged gross misconduct and negligence on the part of the defendants in various specified particulars. This charge the defendants denied in all respects and particulars, and they made substantially the same charge against the plaintiffs, which the plaintiffs denied; and these allegations and denials raise the issue of fact as to misconduct and negligence by both parties.

"Upon this general issue I find, upon a full and fair consideration of the whole testimony, that there is not sufficient evidence to establish the misconduct or negligence of either plaintiffs or defendants. On both sides there was ignorance and inexperience in the proper method of conducting the business contemplated by the partnership agreement, and there was a manifest distrust and lack of harmony between the partners, and the business was not successful, especially the fish guano business; but both plaintiffs and defendants in their way labored diligently, and, as they thought, in the best way, to make both branches of the business successful. Neither plaintiffs or defendants had any knowledge or experience in the manufacture of fish guano. In the canning of mackerel neither of the defendants knew anything of the business when they engaged in it (and this fact was at the time known to the plaintiffs), although one of the defendants (Captain Tarr) had had experience in the catching of mackerel and preserving them fresh for market. One of the plaintiffs (Mr. Sellman) had some experience the previous year in canning herring at Camden, Maine, working for or with Rosenstein Bros., and that year and previous years had

put up sardines, a different process from putting up herring. Rosenstein Bros. had experience in the sale and distribution of canned goods.

"II. Account of the dealings and transactions between said parties.

"In stating this I will consider the accounts which the parties presented before me, and will take up first the account of Burns & Co. against the Union Fish Company, being account marked 'A-2.'

"November 5, 1881, there was an admitted balance due Burns & Co. from the Union Fish Company of $1274.70." (Rec. pp. 31 and 32.)

This finding of facts by the master was not objected to by the plaintiffs, although they filed six objections specified in Record, pp. 48, 49, and 50. But the master refused to change his report, and made it final, notwithstanding the objections. No further objections were taken by the plaintiffs to the master's report.

The case stands thus: Complainants filed their bill alleging certain acts of gross misconduct by the defendants as causes which justified their action in attempting to dissolve the co-partnership by publication on November 5, 1881, and swore to the same, and caused a writ of attachment to be served to the amount of $20,000, and the defendants' property sequestered as well as some of their own, so as to break up entirely and destroy the defendants' business and put their property beyond their reach.

After "thirty-four days" of patient hearing (see master's report, Rec. pp, 29, 30), the master decided every allegation made by the complainants to be untrue and false in fact.

Upon which a final decree was issued by the court below, not dissolving the co-partnership nor establishing the rights

of the parties, but ordering execution against the defendants, as follows: —

DECREE [May 6, 1886].

"This cause came up to be further heard at this term, and was argued by counsel; and thereupon and upon consideration thereof, to wit, May 6, 1886, it is ordered, adjudged, and decreed as follows; viz., that the plaintiffs are entitled to the money in the registry of this court to the credit of this cause, amounting to the sum of thirty-seven hundred and thirty-three dollars and forty cents; and it is further ordered, adjudged, and decreed that said sum of $3733.40 be paid from said registry to the plaintiffs, or W. F. & W. S. Slocum, their solicitors of record in this cause; and it is further ordered, adjudged, and decreed that the said plaintiffs are entitled to recover of said defendants the further sum of sixteen hundred and seventy-nine dollars and fourteen cents, together with interest thereon from the date of the writ in this cause, to wit, from the seventh day of November A.D. 1881, to the date of this decree, and their costs of this suit, to be taxed; and it is further ordered, adjudged, and decreed that the said defendants pay to the said plaintiffs the said sum of $1679.14, together with interest thereon from the date of said writ, to wit, from the seventh day of November A.D. 1881, amounting to the sum of four hundred and fifty-two dollars and eighty cents, said principal sum of $1679.14, and interest, amounting in the whole to twenty-one hundred and thirty-one dollars and ninety-four cents, and costs of this suit, to be taxed; and it is further ordered, adjudged, and decreed that said plaintiffs have execution against said defendants for said sum of $2131.94 and costs of this suit to be taxed as aforesaid, with interest thereon from the date of this decree, according to the course

and practice of this court. By the court, JOHN G. STETSON, *Clerk*." (Rec. pp. 51, 52.)

The receiver took possession of all the personal property belonging to the Union Fish Company which was attached upon the writ in said cause, and sold the same and deposited in the registry of the court below the proceeds of the sale, less the amount allowed for his services and expenses and certain sums paid to the creditors of the firm in settlement of their claims under order of court.

The fund in the registry of the court was afterwards reduced by payment of certain expenses of the suit by agreement of parties, and at the time the decree appealed from was entered in this cause, the balance of said fund remaining in the registry of the court was $3733.40. (Rec. p. 52.)

By the terms of the partnership agreement (Rec. p. 12) it was provided that Rosenstein Bros. should furnish the capital to carry on the business, and for the use of said capital interest at the rate of six per cent per annum should be paid (arts. 3 and 17); and that J. J. Burns & Co. should furnish the premises for carrying on the business, and for the use of said premises $1200 per annum should be paid (art. 11); also that J. J. Burns & Co. should have charge of and superintend the factory and devote all necessary time to the interest of the business generally as regards all business at Gloucester, and were to manufacture and put up such articles and such quantities of the same only, at lowest possible cost, as Rosenstein Bros. deemed advisable. (Arts. 6 and 7.)

The duties to be performed by each party are minutely specified, and the method of dividing the profits and losses between the parties is prescribed by the following articles; to wit, —

"21. It is agreed that Rosenstein Bros. and Henry Sell-

man jointly shall be entitled to five eighths of the net profits of the business, and J. J. Burns & Co. shall be entitled to three eighths of the net profits.

"22. It is agreed that all losses, if any sustained, by reason of bad debts shall be charged to profit and loss account, and are to be borne by the parties jointly in the ratio of their stipulated interest."

The master reported (Rec. p. 37) that the liabilities of the Union Fish Company were —

To J. J. Burns & Co.	$3,733 87
To Rosenstein Bros.	14,434 22
Total	$18,168 09

The master further reported (Rec. p. 39) that —

"By the twenty-first and twenty-second articles of the partnership agreement A, the net profits of the business are to be shared and the losses borne by the plaintiffs and defendants in the proportion of five eighths by the plaintiffs and three eighths by the defendants."

No exceptions to the master's report were filed by the defendants below, and the decree of the court below awarded distribution in accordance with said report.

It appears by the report of the master (Rec. p. 37) that a suit was then pending against the members of said Union Fish Company, brought by Israel C. Mayo, of Gloucester, on a claim against said firm not included in the liabilities of the firm as found by the master. A suit was also pending in which the members of said Union Fish Company were plaintiffs and said Mayo defendant. After this appeal was entered in this court said Mayo recovered judgments in said suits

against the members of said Union Fish Company, amounting in the whole to $1,149.93, and filed his petition in the court below, praying that said sum and interest thereon from January 2, 1888, the date of said judgments, be paid to him by order of court out of the fund in the registry of the court.

By agreement of parties said judgments and interest thereon, amounting in the whole to $1,286.60, have been paid out of said fund under order of court, and said fund now amounts to $2,446.80, which sum constitutes the only remaining assets of the Union Fish Company.

The liabilities of the Union Fish Company as found by the master were liabilities due to members of the firm.

The assets of the firm were more than sufficient to pay all debts and liabilities due from the firm to outside creditors; but the balance remaining after the same were paid was insufficient to pay the partners in full for the amounts severally advanced and contributed by them to carry on the partnership business. Thus the partnership resulted in a loss.

The main questions in this case arise concerning the manner in which this loss is to be treated and adjusted under the partnership agreement.

ASSIGNMENT OF ERRORS.

1.

The master having found the complainants failed to prove any of the allegations of their bill on which they based their prayer for dissolution of copartnership, and such finding having been duly confirmed by the court, the court below erred in not passing a decree dismissing the bill.

2.

The court below erred, if it found the bill sustained upon the proofs in the cause, in not entering a decree to dissolve

the copartnership, and in proceeding to distribute the assets without such decree of dissolution.

3.

The court below erred in acting on the master's construction of the 21st and 22d articles of the partnership contract as a valid part of his report.

4.

The court below erred in construing the partnership contract to require losses of capital to be borne by the partners in the same proportion in which the contract provided for the distribution of net profits.

5.

The court below erred in decreeing that any part of the capital put in by the appellees and not paid back by the assets should be paid by the appellants, and that the appellants should be paid back neither from the assets nor by the appellees for any part of the capital put in by them.

6.

The court below erred in not decreeing priority of payment of the advances found by the master to have been made by J. J. Burns & Co. to the Union Fish Co. next after the payment of all debts and liabilities due from that company to outside creditors.

7.

The court below erred in awarding and allowing costs without a decree of dissolution.

8.

The court below erred in allowing the costs or any part thereof to the complainants of keeping the partnership property, and decreeing execution therefor against the appellants.

PLEADINGS.

The complainants by their bill allege:

1. That large amounts of money were due to the Union Fish Co. from the appellants because of their misconduct.

2. That the appellants failed to keep correct books and accounts of said business.

3. That under the 6th article in the partnership agreement the appellants have not given proper care and time to the business.

4. That they have refused to put up and make proper goods.

5. That the appellants have sold large quantities of goods in violation of the agreement.

6. That the appellants did not give the appellees the privilege, option, or opportunity to co-operate with the appellants in the practical superintendence and management of the factory, but excluded them therefrom, whereby a large amount of bad, spoiled, and unmerchantable goods were put up and canned.

7. That the appellants have not kept proper factory books and accounts, and have ordered and purchased cans of other parties, and have purchased larger amounts of fish than they could cure or care for, whereby great losses occurred.

8. That the appellants have annexed to the real estate a large brick oven.

9. That the appellants induced the complainants to enter into said co-partnership by their false representations and false pretences.

10. That the appellants had not on request delivered up a certain claim against Clarke & Somes, and canned goods which ought to have been shipped to the complainants at their request, and that the complainants are informed and believe that the appellants intend to sell and dispose of said canned goods and to appropriate the same or the proceeds thereof to their own use.

11. That the complainants were informed and believe that by reason of the matters and things hereinbefore mentioned, and especially by reason of the many violations of the provisions of said agreement by the defendants and their misconduct, said business cannot be continued, except at a great and ruinous loss and danger to the property of the complainants, and that they ought not to be required to continue in said business with the defendants, and that the company formed by said agreement ought to be dissolved.

Complainants then pray for an injunction upon the appellants and for further relief.

To this amended bill the appellants answer:

1. They deny each and every allegation not hereinafter specifically admitted, but admit the contract marked Exhibit "A" filed by the complainants.

2. That the appellants admit that they entered into the business provided for in said articles, but deny that the complainants kept or performed any part of or either of the stipulations by them to be kept or performed, but aver that the complainants had made larger sums of money than in their bill set forth.

3. They deny that any just claims whatever have been made against the complainants for or on account of any goods made by the appellants, but aver that the complainants sold other goods as if made by the appellants which were not merchantable.

4. And the appellants aver that they have kept and per-

formed said article 5th, and have kept proper books open to the inspection of complainants, under the direction and supervision of an employé employed by the complainants.

5. And the appellants answer that they have kept and performed said 6th article, and have not neglected said business.

6. And the appellants say that they have fully kept and performed said 7th article, and if any goods were unmerchantable it was because of a failure of the complainants to promptly furnish suitable cans and material.

7. And the appellants answer they have kept and performed the 13th and 15th articles.

8. The appellants have kept the 28th article of said agreement, and have allowed the complainants, by their chosen servants, to take supervision and direction in said factory.

9. And the appellants deny each and every allegation of negligence and carelessness by them in said business.

10. And the appellants say it was the duty of the complainants to furnish a sufficient number of cans, so that the fish might be packed when fresh, but that the complainants neglected to furnish said cans, and that some fish spoiled for want of cans furnished by the complainants in time that they might be seasonably canned; and the appellants say that, because they could not obtain cans from the complainants, they did purchase large quantities of cans from other parties in order to preserve fish purchased by them from being spoiled from want of canning.

11. And the appellants say they employed all help that was needed or profitable.

12. The appellants deny each and every allegation of any false pretences whatever, and pray that they may have the same advantage of this answer as if they had pleaded specifically.

13. And the appellants admit that true it is that they had purchased some fish in Boston, because the fish could be purchased cheaper in Boston at the time than at Gloucester.

14. The appellants answer that they are of sufficient financial ability to pay any or all losses of said business, present or prospective.

15. And the appellants answer "that said complainants, without cause, published a notice that they would not carry on the business under said contract, and that they by public notice dissolved and violated and put an end so far as they could to the same; and the appellants are entirely willing and desirous that all business connections between them and the complainants should be dissolved and forever ended because of the dishonest and fraudulent and unjust conduct and violation of said contract by said complainants.

The appellants pray that said bill be dismissed.

April 21, 1883, the court ordered that the cause be referred to George P. Sanger, Esq., as a Master of this court, to hear the parties and their evidence, and report as to all issues of fact made by the pleadings in said cause, and to take account of the dealings and transactions between said parties, and all claims for damages arising out of said transactions. (Rec., p. 27.)

December 28, upon petition of complainants, John I. Baker was appointed Receiver, to receive all the personal property belonging to the Unior Fish Company which was attached upon the writ in this cause, and to sell and dispose of the same, and to receive all moneys deposited in the hands of trustees under attachment, and upon his receipt of said goods, all attachments thereon were dissolved, except the attachment upon the real estate, which was to remain until the further order of the court.

POINTS AND AUTHORITIES.

I.

The master having found the complainants failed to prove any of the allegations of their bill on which they based their prayer for dissolution of copartnership, and such finding having been duly confirmed by the court, the court below erred in not passing a decree dismissing the bill.

The first question is, whether this bill should not have been dismissed.

We have presented the issues as made by bill and answer shortly, and perhaps unnecessarily.

Because the master's report finds (Rec., p. 31) "that the main issue of fact raised by the pleadings is the conduct of both plaintiffs and defendants in regard to the partnership business. The plaintiffs charged gross misconduct and negligence on the part of the defendants in various specified particulars. This charge the defendants denied in all respects and particulars, and they made substantially the same charge against the plaintiffs, which the plaintiffs denied; and these allegations and denials raise the issue of fact as to misconduct and negligence by both parties."

"Upon this general issue I find, upon a full and fair consideration of the whole testimony, that there is no sufficient evidence to establish the misconduct or negligence of either plaintiffs or defendants. On both sides there was ignorance and inexperience in the proper method of conducting the business contemplated by the partnership."

These findings were not even excepted to.

If the statement of this proposition is not sufficient, it is difficult to argue.

Every allegation of the plaintiffs on which their suit is founded being specifically denied by the defendants, is found, on submission to the proper tribunal, not

proven, as there is "not sufficient evidence to establish the same."

A causeless suit within the knowledge of the plaintiffs is brought by them by attaching under the laws of Mass. all the property of the defendants, real and personal, and all the property of the partners, to an amount beyond the power of the defendants to relieve the attachment, and kept under great expense, to wit, $1,680.53 (Rec., p. 39). After the attachment, because of false allegations of the bill, a receiver was appointed who sold out many thousand dollars' worth of property of a perishable nature, with every allegation in that suit not proven.

A judgment is awarded of $2,131.94, and the cost taxed at $973.34, an amount much exceeding that having been reserved from the assets theretofore belonging to the partners (R., pp. 47–57). Is this a proper administration of the law in a court of equity? We are left without the power to argue the invalidity of such decision.

II.

The court below erred, if it found the bill sustained upon the proofs in the cause, in not entering a decree to dissolve the copartnership, and in proceeding to distribute the assets without such decree of dissolution.

No decree of dissolution of the copartnership was entered.

Assuming that the court below could without error have decided as we have above described, it would seem to follow that the court must have found something on which to place its final adjudication. That would seem to have been of necessity a decree of dissolution of copartnership before it could proceed to divide the assets between the partners, but the final decree shows that no decree of dissolution as prayed for in the bill was entered.

We do not think we need cite authorities to establish this for error. We will wait to hear it supported by authority before we answer further.

III.

The court below erred in acting on the master's construction of the 21st and 22d article of the partnership contract as a valid part of his report—

Because the master in reporting how the losses of capital should be borne was not acting within the scope and authority of the order of reference, which specifically limited him to report on facts and gave him no right whatever to give a construction as to the legal meaning of the provisions of the partnership contract.

IV.

The court below erred in construing the partnership contract to require losses of capital to be borne by the partners in the same proportion in which the contract provided for the distribution of net profits—

1. Because it appears from the partnership contract that the capital which each party put into the partnership was to remain the property of the partner contributing it as between the partners themselves, in that special provision is made for compensation to each partner for the use of the capital contributed. Rosenstein Bros. were to be paid six per cent. interest per annum for their share of the capital, while J. J. Burns & Co. were to be paid the specific sum of $1,200 per annum for the premises furnished by them for carrying on the partnership business.

Had the buildings furnished to the partnership by the appellants been destroyed by fire or flood, or the ground on which they stood been destroyed by flood or swallowed up by an earthquake, the appellants could have made no claim on the appellees for the loss of the same, for title to the same in no manner passed to the partnership as between the partners, the only right of the partnership to the same being limited to the use thereof, for which the partnership was to pay $1,200 a year.

Precisely the same rule must apply to the moneys advanced by the appellees, and the partners acquired no right to the same as partners save the sole right to the use of the money for which the partnership was bound to pay six per cent. per annum.

The partnership was indebted to the partners for the use of the capital and not for the capital itself, and when any part of the capital ceased to be, the right of its owner even to payment for the use of it was ended.

The appellants, therefore, contend that the liabilities found by the master to be due from the firm to Rosenstein Bros., being the loss of a portion of the capital furnished by them, do not properly, under the partnership agreement, constitute a partnership loss, to be borne by all the partners, but should be regarded simply as the individual loss of Rosenstein Bros. alone.

These liabilities represent the capital furnished by Rosenstein Bros. under the partnership agreement, less the amount received by them from sales of goods manufactured by Burns & Co. All the moneys paid in by Rosenstein Bros. under said agreement were contributed by them as capital for the purpose of carrying on the partnership business. This capital they intended to risk in the business just as Burns & Co. risked what was contributed by them to the partnership. One was set against the other. Burns & Co. have no claim upon the partnership for the loss of a portion of the capital contributed by them, to wit, their time and labor, and the partnership should not be held liable to Rosenstein Bros. for the loss of a portion of the capital contributed by them.

Everly v. *Durborow*, 1 Leg. Gaz. Rep., 127.
Cameron v. *Watson*, 10 Rich. Eq., 64, 101, 102, 103.
Heron v. *Hall*, 1 B. Mon., 159.
Barfield v. *Longborough*, L. R. 8 Ch., 1.
Manley v. *Taylor*, 50 Superior Ct. N. Y., 26.
See also *Hasbrouck* v. *Childs*, 3 Bosworth (N. Y.) 112 *et seq.*

It is submitted that the true theory is that the capital contributed by a partner becomes the property of the firm only for the purposes of the partnership business. The transfer to the firm is provisional only, and when the partnership is ended the capital reverts to the partner who contributed it. As to outside creditors the capital is the property of the firm, but as between the partners themselves the capital remains the property of the partner contributing it, and is at his risk.

The capital contributed becomes the property of the partnership only because it is necessary to treat it as such for the purposes of the partnership business. It remains the separate estate of the contributing partner subject to the temporary transfer to the firm, and if the capital is lost, either in whole or in part, the loss falls upon the owner of the capital who contributed it, and a co-partner ought not to be called upon to make up any part of such loss.

See Parsons' Principles of Partnership, §§ 25, 33 *et seq.* (1889).

There is nothing in the partnership agreement from which it can be inferred that Burns & Co. guaranteed the capital contributed by Rosenstein Bros.

2. That it was not the intention of the parties that a loss of capital, such as Rosenstein Bros. sustained, should be considered as a partnership loss, to be borne by all the partners, is apparent from the 22d article of the partnership agreement, which provides that "all losses, if any sustained, *by reason of bad debts*, should be charged to profit and loss account, and are to be borne by the parties jointly in the ratio of their stipulated interest." (Rec., p. 14.)

It is submitted that the plain meaning of this provision in relation to losses is losses by reason of the non-payment of debts due the firm from persons outside the partnership.

It cannot by any fair interpretation be held to mean a loss of capital.

It does not appear in this case that there were any losses by reason of bad debts within the meaning of this article.

If it were the intention of the parties that other losses than those by reason of bad debts were to be regarded as partnership losses, to be borne by all the partners, it is to be presumed that the partnership contract would have so stipulated.

From the fact that losses of a particular kind are mentioned, it may fairly be inferred that, in drawing up the partnership contract, the partners considered the subject of losses generally, including a possible loss of the capital to be invested in the business, and, after such consideration, they decide to limit the losses that were to be borne by all the partners to the particular kind mentioned, and for that reason those were the only kind specified in the contract, being the only kind that they intended should be regarded as partnership losses, to be borne by all the partners.

By article 20 of the contract of partnership the parties agreed "that a correct inventory be taken on the 31st of December of every year of all assets and liabilities, and a balance sheet be drawn, and the amount of profit or loss up to the 31st of December be determined by the customary methods of double-entry bookkeeping. The machinery shall be valued as per machinery account, less the reduction charged off for wear and tear. The materials shall be valued at what it would cost to lay them into store or factory, and the manufactured stock at cost price." (Rec., p. 14.)

By article 21 it is provided how the net profits are to be shared by the partners, and, by article 22, how losses by reason of bad debts are to be borne by them.

It thus appears that after adopting by article 20 a method for ascertaining the total amount of losses, including a loss of capital as well as losses by reason of bad debts, the parties nevertheless saw fit, by article 22, to select only the latter kind of losses as the kind to be borne by all the partners, thus clearly manifesting their intention that only the latter kind of losses should be borne by all the partners.

When the provisions of articles 20, 21, and 22 are considered together, it is very evident that the parties did not intend that any other losses than those by reason of bad debts should be borne by all the partners.

If they had intended that such a loss as a loss of capital should be borne by all the partners, article 22 would have been framed differently.

Thus the partnership contract, in providing the proportion in which the partners should sustain loss by bad debts, and making no provision for losses of any other kind, is conclusive of the fact that losses of capital were to be borne by the owners of the capital and not by the partnership, which had simply *purchased* the *use* of that capital.

3. It is submitted that the case at bar is plainly distinguishable from those cases where it was held that a loss of capital is a partnership loss, to be borne by all the partners.

The decision in each case depends upon the intention of the parties, to be deduced, if possible, from the contract of partnership into which they have entered.

Whitcomb v. *Converse*, 119 Mass., 38, and *Nowell* v. *Nowell*, L. R. 7 Eq., 538, are cases cited and relied on to support the view that a loss of capital constitutes a partnership loss, to be borne by all the partners; but it is submitted that, in respect to the matter of partnership losses, both those cases differ widely from the case at bar.

In *Whitcomb* v. *Converse*, *supra*, there was no provision as to losses in the partnership agreement. It was held in that case that "in the absence of controlling agreement partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership." It was decided that a loss of capital was a partnership loss, to be borne by all the partners; but the fact

that the parties had made no provision as to losses in their partnership agreement makes that case wholly different from the case at bar, where there was an express agreement that losses by reason of bad debts should be borne by the parties in the proportion of their stipulated interest, leaving it to be fairly inferred from the fact that no other losses were mentioned or referred to in said agreement that the parties did not intend that any other losses should be borne by all the partners.

It would seem to be quite as important to stipulate that a loss of capital should be borne by all the partners, if such were the intention of the parties, as it was to stipulate that losses by reason of bad debts should be so borne.

In *Nowell* v. *Nowell*, *supra*, where one partner advanced more capital than the other to the extent of £1,900, and the net assets were only £1,400, and it was held that the deficiency of £500 was a debt to which both were liable to contribute equally, there was an express agreement that profits should be shared and losses borne in equal shares ; the term "losses" being used in a general sense without qualification or limitation. It included, therefore, all losses incurred in the partnership business, a fact which makes that case clearly distinguishable from the case at bar, where the term "losses" is expressly qualified and restricted by the words "by reason of bad debts."

In determining the question, therefore, whether in the case at bar a loss of capital is to be considered as a partnership loss, to be borne by all the partners, we are confined to the contract which the parties themselves chose to make when they entered into the copartnership ; and, if, as is apparent in the case at bar, the parties have seen fit to select a particular kind of loss as the one to be borne by all the partners, the law will not by implication enlarge the express provision made by the parties themselves so as to include other losses than those stipulated therein.

V.

The court below erred in decreeing that any part of the capital put in by the appellees and not paid back by the assets should be paid by the appellants, and that the appellants should be paid back neither from the assets nor by the appellees for any part of the capital put in by them.

VI.

The court below erred in not decreeing priority of payment of the advances found by the master to have been made by J. J. Burns & Co. to the Union Fish Company next after the payment of all debts and liabilities due from that company to outside creditors.

The liabilities found by the master to be due from the firm to Burns & Co. represent advances made by them to the firm, which they were not required to make under the partnership agreement. They were not to risk any money in the business, Rosenstein Bros. agreeing to furnish the capital required. There was no limitation as to the amount of capital which Rosenstein Bros. were to furnish. The words of the agreement are "to furnish the capital to carry on the business." (Art. 3.) This would clearly include all necessary or proper expenditures made in the course of the partnership business. The only restriction was as to the amount which Burns & Co. were to draw on Rosenstein Bros. for in any one draft; the agreement providing that Burns & Co. were to draw on Rosenstein Bros. for funds required in the business in sums of not over $1,500 in any one draft. (Art. 25.) Rosenstein Bros., however, did not furnish all the capital required to carry on the business, notwithstanding the agreement; and it thus became necessary for Burns & Co. to make advances for this purpose. In this way the firm became indebted to Burns & Co. to the amount found by the master. That these advances were

proper and legitimate is shown by the finding of the master that they constitute liabilities of the partnership due Burns & Co., in determining the amount of which the master excluded their claim for labor (Rec., p. 32), on the ground that under the partnership agreement they were bound to devote all necessary time to the business.

These advances made by Burns & Co. should be considered as loans to the partnership and as debts due from it payable to a member of the firm instead of an outside creditor.

Wood v. *Scoles*, L. R., 1 Ch., 369.

And, upon a final settlement, they should be paid out of the assets of the firm next after debts due to non-partners.

Lindley on Partnership (2d Am. ed.), 402.

Leserman v. *Bernheimer*, 113 N. Y., 39.

See also *Hill* v. *Beach*, 1 Beas. (N. J.) 31, 41, where it is held that a partner has a lien upon the partnership assets for money advanced by him for the partnership.

As the loss sustained by Rosenstein Bros. represents a loss of capital, and not of advances made by a partner, it stands differently in respect to the order in which it should be paid out of the partnership assets from the liabilities to Burns & Co., which represent advances made by them to the firm; and the latter should be paid before the former in the order given by Mr. Lindley, viz., "In adjusting the accounts of partners, the assets of the partnership should be applied as follows:

"1. In paying the debts and liabilities of the firm to non-partners.

"2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital.

"3. In paying to each partner ratably what is due from the firm to him in respect to capital.

"4. The ultimate residue, if any, will then be divisible as

profit between the partners in equal shares, unless the contrary can be shown."

Lindley on Partnership (2d Am. ed.), 402.

As the assets of the Union Fish Company were more than sufficient to pay all the debts and liabilities of the partnership to non-partners, the liabilities found by the master to be due Burns & Co., being a debt of the firm payable to one of the members for advances made to the firm, must be paid out of the remaining assets next after the debts to non-partners.

The assets now remaining are insufficient to pay said liabilities in full, and a large balance would still be due from the firm to Burns & Co.

This unpaid balance, it is submitted, would constitute a debt of the partnership to which all the partners will be bound to contribute, the same as they would be bound to contribute to debts of the firm due to outside creditors if the assets had been found insufficient to pay such creditors in full.

Lindley on Partnership, 402, 403.

VII.

By the decree appealed from, the court below adjudged that the appellees were entitled to the money in the registry of the court, which at that time amounted to $3,733.40, and also that Burns & Co. pay to the appellees the further sum of $1,679.14, with interest from November 7, 1881. (Rec., p. 52.)

The last-named sum, $1,679.14, is three-eighths of the balance of the total liabilities found by the master, after deducting the assets (the fund in the registry of the court), less the liabilities due from the firm to Burns & Co., viz:

Liabilities to Burns & Co.	$3,733 87
Liabilities to Rosenstein Bros.	14,434 22
Total liabilities found by the master	$18,168 09
Deducting assets	3,733 40
Balance of liabilities	$14,434 69
Three-eighths of $14,434.69	$5,413 01
Deducting liabilities to Burns & Co.	3,733 87
	$1,679 14

It appears by this decree, therefore, that the court below took the view that the loss of capital sustained by Rosenstein Bros. was a partnership loss to which Burns & Co. were bound to contribute in the proportion ~~to~~ in which profits were to be shared by them.

It is submitted that this view is erroneous and ought not to be sustained, and that said decree should be reversed.

VIII.

If the view taken by the appellants be correct, the decree of the court below should be reversed; and the fund in the registry of the court below should be appropriated to the payment of the liabilities found by the master to be due from the firm to Burns & Co. As this fund is insufficient to pay said liabilities in full, the balance of the same remaining unpaid would constitute a debt of the partnership to which the partners would be bound to contribute in the proportion in which profits were to be shared—five-eighths by the appellees and three-eighths by Burns & Co., viz:

Liabilities of the firm due Burns & Co.....	$3,733 87
Deducting fund in the registry of the court.....	2,446 80
Balance due Burns & Co., to be contributed by the partners.....	$1,287 07
Five-eighths of $1,287.07 to be contributed by the appellees.....	$804 42

On which sum interest should be computed from November 7, 1881.

Barker v. *Mayo*, 129 Mass., 517.

Morris v. *Allen*, 1 McCarter Ch. (N. J.), 44.

IX.

The court below erred in awarding and allowing costs without a decree of dissolution.

X.

The court below erred in allowing the costs, or any part thereof, to the complainants of keeping the partnership property, and decreeing execution therefor against the appellants.

1. Because no officer's fees can be properly taxed in an equity cause in the court below for attachment of or other services in connection with the keeping of property.

2. Because the personal property attached in this suit was partnership property belonging to the Union Fish Company, and could not be properly attached in a suit between the partners growing out of partnership affairs; and all fees arising from such attachment should be disallowed.

EUGENE J. HADLEY,
BENJ. F. BUTLER,
of Counsel.

Supreme Court of the United States.

No. 207. October Term, 1889.

JOSEPH J. BURNS AND ROBERT TARR,
APPELLANTS,

v.

JULIUS W. ROSENSTEIN, LEO ROSENSTEIN, AND HENRY SELLMANN.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

APPELLEES' BRIEF.

WILLIAM F. SLOCUM,
Counsel for Appellees.

BOSTON:
PRESS OF ROCKWELL & CHURCHILL.
1890.

Supreme Court of the United States.

No. 207 October Term, 1889.

JOSEPH J. BURNS and ROBERT TARR, Appellants,

v.

JULIUS W. ROSENSTEIN, LEO ROSENSTEIN, and HENRY SELLMANN.

Appeal From the Circuit Court of the United States For the District of Massachusetts.

W. F. SLOCUM, *Counsel for the Appellees.*

APPELLEES' BRIEF.

Statement of the Case.

The original cause was a suit in equity brought by the appellees against the appellants for the dissolution of a copartnership, and for an account and settlement of its affairs.

The articles of copartnership were between Julius W. Rosenstein, Leo Rosenstein, and Henry Sellmann, a copartnership then and previously existing under the firm name of Rosenstein Brothers & Henry Sellmann in the city of New York, the plaintiffs in the original cause, and the appellees here, and Joseph J. Burns and Robert Tarr, a copartnership then and previously existing under the firm name of J. J. Burns & Co.,

at Gloucester, in the county of Essex and State of Massachusetts.

These articles are set forth in Exhibit "A" annexed to the original bill, and copied in the Record, p. 12 to 15.

The appellees were traders and dealers of experience in canned goods (Master's report, Record, p. 31, bottom of the page).

By the agreement the appellees were to furnish the capital necessary to carry on the business (agreement, Art. 3, p. 12), to be drawn for by appellants as required in the business, in sums of not over fifteen hundred dollars in any one draft (Art. 25, Record, p. 14). And to be allowed interest on the capital so invested by them at the rate of six per cent. per annum (Art. 17, Record, p. 14). By the same agreement the appellants were to have the charge and superintendence of the factory, on the premises of said J. J. Burns & Co., at Gloucester, and to manufacture and put up such articles, and such quantities of the same only, at lowest possible cost, as Rosenstein Brothers deem advisable; quality of goods to be *good*, *merchantable* (Arts. 6, 7, 11, p. 13 of Record).

They were also to ship all manufactured goods to the appellees as soon as ready for shipment, unless otherwise instructed by them (*Id.*, Arts. 13, 14, p. 13).

The appellees were to sell the goods, and sell among other ways through travelling salesmen in different parts of the country, and to be allowed among other things $1,000 per annum for the travelling expenses, for the purpose of introducing and effecting sales of the goods (Art. 18, Record, p. 14).

The business was carried on from about May 1, 1881, to November 5 of the same year. During that time the appellants manufactured, put up, and sent to the appellees to be sold by them as an article of food sealed cans of bad fish, for which they had to refund to their customers the sum of $1,877.13.

Master's report, Record, p. 35.

This bad fish being in sealed cans, the quality would not be

detected by the appellees, or by any one else, until the cans were opened for use by the consumer.

Such sales would undoubtedly be a penal offence in every State in which they were sold, and the sales of them would ruin the reputation and business of the appellees as traders; and it was found that the partnership business could not be carried on profitably, if at all; that the appellants could not perform their part of the agreement because of inexperience and incompetency; and that there was a manifest distrust and lack of harmony between the partners; and that the business was not successful.

Record, p. 31.

There was then due to appellants for advances actually made, and liabilities contracted on account of the copartnership	$28,368 65
Which was reduced by sales of fish on hand by .	13,934 43
Leaving still due them an admitted balance of .	$14,434 22
Which with a found liability to appellants of .	3,733 87
Made the liabilities of the firm amount to . .	$18,168 09
And the assets amounted to only . . .	3,733 40
Showing a loss on the season's business in about six months of	$14,434 69

(See Master's report, Record, pp. 36, 37, and decree, Record, pp. 51, 52.)

And from the facts found there was no possible chance of improvement, but on the contrary it was manifest that if the business had continued it must have ended in disaster and bankruptcy.

See statement above, and Master's report, pp. 31, 35.

The appellees in the mean time had, with experience, skill, and fidelity, performed their part of the agreement. They had ex-

perience in the sale and distribution of canned goods, and there was no question but that they distributed the goods manufactured by the Union Fish Company to the best advantage, and sold them for a fair market price, and collected and accounted for the proceeds, nor was there any default on their part in advancing capital as fast as called upon by the drafts of the appellants.

Upon this state of the case the appellees gave notice of the dissolution of the partnership, and a few days thereafter commenced suit to wind up its affairs.

The suit was commenced by bill inserted in an original writ of summons and attachment under the provisions of Sect. 3 of Chap. 113 of the General Statutes of the Commonwealth of Massachusetts, which were in force at the date of the writ, which is as follows: "Sect. 3. Cases in equity may be commenced by bill or petition with a writ of subpœna according to the usual course of proceedings in equity, or inserted in an original writ of summons, or of summons and attachment, or by a declaration in an action of contract or tort, as the case may be, with or without an order for the attachment of the property or arrest of the defendant; and shall be returnable at the terms of the Court as established in the several counties, or on the rule days established by the Court."

The same provisions are contained in revision of the Statutes of Massachusetts of 1882, called Public Statutes, Chap. 151, Sect. 5, and were in the Revised Statutes of 1836, Chap. 90, Sect. 117.

The writ in which the bill was inserted was dated Nov. 7, 1881, and returnable to the Supreme Judicial Court of the State of Massachusetts, at the Rules held at Salem in the county of Essex, on the first Monday of December next following its date.

See copy of writ, pages 1 and 2 of Record.

The writ was duly served by attachment of property and summons.

See officer's return, pages 2, 3, and 4 of Record.

The writ with the bill inserted in it was duly entered in the

Court to which it was made returnable, and the defendants therein mentioned (being the appellants in this case) appeared and filed their answer thereto.

The original bill and answer are not printed in the record of this case.

See memoranda, page 5 of Record.

And on the nineteenth day of December, 1881, the original plaintiffs filed their amended bill in said cause in the State Court.

See Record, pages 5 to 12 inclusive.

During the pendency of the suit in the Supreme Judicial Court of Massachusetts, viz., December 28, 1881, by consent of counsel it was ordered by the Court that John I. Baker, Esq., of Beverly, county of Essex, be appointed receiver.

See copy of order of Court, pages 16 and 17 of Record.

The original defendants, the appellants herein, also filed in the State Court, April 29, 1882, a demurrer to the plaintiffs' amended bill.

See demurrer to amended bill, page 17 of Record.

And thereupon and before action on the demurrer, viz., April 24, 1882, the cause was removed from the State Court to the Circuit Court of the United States for the district of Massachusetts, on the petition of appellants.

See petition and order for removal, pages 17, 18, and 19 of Record.

And thereafter there was a hearing in the Circuit Court on the demurrer, filed in the State Court, before Nelson, J., and the demurrer was by him overruled, Oct. 24, 1882.

See opinion of the Court on the demurrer, pages 58 and 59 of the Record.

After the demurrer was overruled the appellants filed an answer to the amended bill, and the appellees filed a replica-

tion, and the cause was sent to George P. Sanger, Esq., as a Master, with the powers contained in the order of the Circuit Court, as it appears on page 27 of the Record.

A further history of the case and the issues in it is contained in the Master's report, pages 28 *et seq.* of the Record.

The demurrer was properly overruled. No question as to this is made in the appellants' brief.

After the demurrer was overruled, viz., Nov. 16, 1882, the defendants filed their answer (Record, page 20 *et seq.*).

In the answer the appellants say "that the plaintiffs" (appellees) "without cause published a notice that they would not further carry on the business under said contract, and that they by public notice dissolved, violated, and put an end so far as they could to the same; and the defendants are entirely willing and desirous that all business connections between them and the plaintiffs should be dissolved and forever ended" (Record, page 22, bottom of page).

Upon filing the answer, Dec. 14, 1882, the appellees filed their replication thereto (Record, page 23). And thereafter, on the twenty-first day of April, 1883, an order was passed referring the case to George P. Sanger, Esq., as Master "to hear the parties and their evidence, and report as to the issues of fact made by the pleadings in said cause, and to take an account of the dealings and transactions between said parties, and all claims for damages arising out of said transactions" (Record, page 27). And the said Master after a full hearing, in pursuance of the order appointing him, made the report, which was returned to and filed in Court (Record, page 28, *et seq.*).

No exceptions to the Master's report were taken or filed by either party, and on the seventh day of December, 1886, the report was confirmed under Equity Rule 83 (Record, page 50).

A further history of the case and the issues in it is contained in the Master's report (Record, page 28 *et seq.*)

Among other things the Master reported that "substantially everything concerning the performance of the contract and the conduct of the parties in the performance of their duties and obligations under the contract was in dispute. Some of these matters became of little importance as they affected the pro-

priety of dissolving the partnership (which was subsequently assented to) rather than the question of damage, no general or special damage being claimed therefor," and the lengthy hearings thereupon proceeded for the purpose of taking the account between the partners (Record, page 31).

Points and Authorities.

I.

Appellants' first assignment of error is not well taken. There was no error in the decree as to the dissolution of the copartnership, and the Court below did not err in not passing a decree dismissing the bill.

1. The Master reported that " some of these matters became of little importance, as they affected the propriety of dissolving the partnership (which was subsequently assented to) rather than the question of damages, no general or special damage being claimed therefor." (Master's report, Record, p. 31.)

This clause in the report refers to the allegations in the bill on which the appellees based their prayer for dissolution of the copartnership, and all objections to the bill, if any there were, on this ground was waived by the appellants.

This was understood, and the case went on on the theory that all objection to the dissolution was waived, and that the account was to be taken. The Master speaks of the dissolution as a fact in his report. On page 38 of Record he says: " There was proof that some of the fixtures had been, *after the dissolution*, severed from the realty by the defendants " (the appellants), " with the consent of the mortgagee " . . . and that " it was also in evidence that *after the dissolution*, the defendants, with the consent of the mortgagee, took down the oven in which was the broiler." . . .

2. The appellants made no objection to the dissolution, but in their answer they admit that the copartnership was dissolved,

and say that "they are entirely willing and desirous that all business connection between them and the plaintiffs should be dissolved and forever ended."

Defendants' Ans., Record, page 22, last paragraph.

3. By consent of the parties a receiver was appointed in the State Court.

Order of Mass. Supreme Judicial Court, Record, page 16.

4. The facts reported by the Master show a sufficient cause for the dissolution and notice thereof, by appellees, if it had not been consented to, because of the violation of appellants' agreement contained in Arts. 6 and 7, that the quality of the goods manufactured and put up should be "good, merchantable."

Record, page 13.

By the agreement, Art. 3 (Record, p. 12), the appellees were to furnish the capital to carry on the business; by Arts. 13 and 15 (Record, p. 13), all manufactured goods were to be shipped to appellees by appellants as soon as ready for shipment; and by Art. 7 (Record, p. 13), were to be good, merchantable; and by Art. 18 (Record, p. 14), provision is made for the introduction and sale of the goods by appellees.

By the Master's report at the bottom of page 31 of Record, it was found that the appellees were experienced traders in the sale and distribution of canned goods; and that on the 5th of November, 1881, there was a balance due them of $23,358.11 for cash advanced, and on the final settlement a balance of $14,434.22 was due them. (See Master's report, Record, pp. 36 and 37.)

And the Master found that the appellants manufactured, put up, and sent to the appellees to be sold by them as an article of food sealed cans of bad fish, for which they had to refund to their customers the sum of $1,877.13.

Master's report, Record, page 35.

This bad fish being in sealed cans the quality would not be detected by the appellees, or by any one else, until the cans were opened for use by the consumer.

Such sales would undoubtedly be a penal offence in every State in which they were sold, and the sales of them would ruin the reputation and business of the appellees as traders.

And the officer's return shows that there were 1,896 cans of fish bad in quality on hand at the time of the attachment. (Officer's return, Record, page 2, and Schedule "A" referred to and made a part of the return, 3d item, Record, page 4).

5. The Master reported that the partnership business could not be carried on profitably, if at all; that the appellants could not perform their part of the agreement because of inexperience and incompetency; and that there was a manifest distrust and lack of harmony between the partners; and that the business was not successful.

Record, page 31.

And the case shows that there was a loss on that season's business of $14,434.69.

See decree, Record, pages 37, 51, 52.

And from the facts found by the Master there was no possible chance of improvement, but on the contrary it was manifest that if the business had continued it must have ended in disaster and bankruptcy.

See statement, *ante*, pp. 4, 5.

The appellees in their bill set up the clause in the contract which required the appellants to put up goods that were good and merchantable, and alleged that they had violated that clause of the contract, and put up goods that were not good and merchantable, — goods that were spoiled and unfit for use, — to the damage of the business and the injury of the appellees in their other business and of their reputation as dealers. (Bill, paragraph 4, pp. 7 and 8 of Record.) And these were some of the matters referred to in paragraph 11 of said bill on page 11 of the Record, as violations of the agreement whereby the

business could not be carried on, except at great and ruinous loss and danger to the property of the appellees.

6. Under these circumstances it would have been the duty of the Court to have decreed the dissolution as prayed for, if it had not been assented to or made by the parties.

"A Court of Equity may decree a dissolution of a partnership . . . for the misconduct, or fraud, or violation of duty of one partner; or on account of the inability or incompetency of one partner to perform his obligations and duties, and to contribute his skill, labor, and diligence in the performance and promotion of the object of the partnership; or for the existence of an impracticability in carrying on the undertaking for which the partnership was formed."

Fogg *et al. v.* Johnston, 27th Ala., 432, 436.
(Reed, J., citing Story on Part., Sects. 6 and 285 to 291.)
Harrison *v.* Tennant, 21 Beav., 482.
Electric Telegraph Co. *v.* Ireland, 22 Beav., 471.

The current authority seems to be that every partner has a right to dissolve a partnership before the term for which it was agreed it should continue has expired.

In Solomon *v.* Kirkland, 55 Mich., 556, it was held that there was "no such thing as an indissoluble partnership, and that every partner had an indefeasible right to dissolve by publishing his own volition to that effect."

And in Mason *v.* Connell, 1 Whart., 381, it was held "that a partnership for a definite and prescribed period was dissoluble by either partner at any time; that it was for the public interest that no partner can be obliged to continue in a copartnership against his will, inasmuch as a community of goods in such case engenders discord and litigation," and that that was the civil law.

And in Skinner *v.* Dayton, 19 Johns., 513, 538, Platt, J., "there was no such thing as an indissoluble partnership; every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect."

II.

The appellants' assignment of error numbered 2 is not well taken.

The dissolution of the copartnership having been admitted and consented to by the appellants (the original defendants), it was not necessary for the Court to enter a decree therefor, or to recite the fact.

All that was left for the Court to do was to take the account between the parties, distribute the assets, and determine as to the contribution of the copartners toward the losses, and make a decree as to the payment thereof and the costs.

A more formal decree of dissolution or a recital in the decree of the matters upon the record which shows that there had been a dissolution was not required.

86th Rule in Equity.

In this country the decree does not ordinarily recite the facts upon which it is founded.

Whiting *v.* The Bank of the United States, 13 Pet., 6, 14.

III.

Appellants' assignment of error numbered 3 is not open to him here.

The appellants made no objection to the Master's report before him as to the proportion of the losses that the respective parties were to bear, and no exception was taken by the appellants to the report in the Court below, and it was confirmed as required by Rule in Equity No. 83.

Record, page 50.

It is well settled that no objections to a Master's report can be made which were not taken before the Master, and that this Court will not review a Master's report upon exceptions taken here for the first time.

McMicken *v.* Perrin, 18 How., 504, 306.

Story *v.* Livingston, 13 Pet., 359, 366.

The question whether the finding of the Master as to the proportion of losses to be borne by the respective parties under the contract was within his powers should have been raised before the Master under the rule, and by exception in the Court below, and cannot be raised here for the first time.

But the finding of the Master in this regard was within his power. He was directed by the Court not only to find "as to all issues of fact made by the pleadings in said cause," but was also required "to take an account of the dealings and transactions between the parties, and all claims for damages arising out of said transactions." (Order of Court appointing Master, Record, page 27). A Master could not perform this latter duty without construing the articles and passing upon such rules of law as arose with reference thereto.

IV.

The same considerations apply to appellants' assignment of error numbered 4.

The Master finds and reports that the losses are to be borne by the plaintiffs and defendants in the proportion of five-eighths by the appellees and three-eighths by the appellants, according to the twenty-first and twenty-second articles of the partnership agreement. (See last paragraph in the Master's report, page 39 of the Record.)

This finding involved not only the face of the paper, but all such surrounding facts and circumstances, including the practice, dealings, and conduct of the parties, as was proper to be taken into consideration in coming to the result.

The provision of the contract (Art. 22, Record p. 14), "That all losses, if any, sustained by reason of bad debts, shall be charged to profit and loss account, and are to be borne by the parties jointly in the ratio of their stipulated interest," was inserted in the contract because the goods were to be shipped to Rosenstein Brothers, and sold by them under the contract (Arts. 13, 15, and 18, pp. 13, 14 of Record). Appellants were to have charge of the factory at Gloucester, and manufacture and put up and ship the goods. But Rosenstein

Brothers were not to be held to guarantee the payment of all claims for goods sold by them, and if any of those claims were not paid, or should be uncollectable, they should be charged to the profit and loss account on the books of the firm, and the losses shared as losses of the firm by the partners, according to their interest.

The clause was not intended to exclude the legal liability of all the partners to share all losses in the same proportion that they were to share the profits.

This appears also from the clause in Art. 22 that "losses, if any, sustained by reason of bad debts shall be charged to profit and loss account." It would be absurd to say that this clause excluded the parties from charging any other losses to profit and loss account.

It is a well-settled rule of law, that "in the absence of controlling agreement partners must bear the losses in the same proportion as the profits of the partnership, even if one contributed the whole capital, and the other nothing but his labor or services."

Whitcomb *v.* Converse, 119 Mass., 38, 42 *et seq.*
Nowell *v.* Nowell, L. R., 7 Eq., 538.
3d Kent's Com. (12th Ed.), 28, 29, and note 1.
2 Lindley on Part. (2d American Ed.), star pages 402, 403; (Wentworth's Ed., Boston, 1888), star pages 401, 402, 403.
Story on Part. (7th Ed.), Sect. 24 and notes.
Moley *v.* Brine, 120 Mass., 324.

In Nowell *v.* Nowell, cited above, A and B entered into co-partnership, and the profits and losses were to be borne equally between them. A advanced £1,900 more capital than B The assets amounted to only £1,400. It was held that A was entitled to the £1,400 assets, and that the deficiency was to be paid one-half by B.

The Vice-Chancellor in Nowell *v.* Nowell overruled the case of Wood *v.* Scoles, L. R. 1, Ch. 369, as also a passage in one of the earlier editions of Lindley on Partnership, to the effect that "partners are not in such cases to contribute to

losses in the absence of any agreement requiring them to do so."

The case of Everly *v.* Durborow, 1 Leg. Gaz. Rep., 127, was a *nisi prius* decision, with no reference to authorities, except an earlier edition of Lindley on Partnership, which has been since corrected by the author conformably to the adjudged cases.

Whitcomb *v.* Converse, 119 Mass., 43.

The case of Cameron *v.* Watson, 10 Rich. Eq., 64, was also cited, considered, and commented upon, and it was found that that case was not in conflict with the law as found by the Court in Whitcomb *v.* Converse, 119 Mass., 43, 44.

In Whitcomb *v.* Converse, one of the partners contributed the capital, and there was a loss on winding up the affairs of the firm. In that case, as in this, there was an express agreement that the partner contributing the capital should receive interest thereon at the rate specified in the articles of the co-partnership. There were four partners, and by the agreement each one was to receive one-fourth of the net profits, and the agreement was silent as to the losses. It was held that by implication of law each partner should share the losses in the same proportion as he would have shared the profits; that the capital contributed became the property of the partnership, and that the partnership consisting of all the partners became liable to the partners contributing the capital, respectively, for the amount of capital paid in by them.

In that case most of the authorities cited by the appellants here, under this point, were cited by the counsel for the defendant and considered by the Court.

In Wood *v.* Scoles, L. R. 1 Ch., 369, the articles of copartnership provide that the money put into the firm in excess of the agreed amount of capital to be furnished should be considered a loan.

L. R. 1 Ch., 370, 378.

In Manly *v.* Taylor, 50 N. Y. Superior Court R., 26, and in Hasbrook *v.* Childs, 3 Bosworth, 112, cited by appellants, the

party advancing the capital was a silent partner and took no part in the business; and in those cases the judges say that there is no inflexible rule that the partner furnishing no capital shall not contribute to the losses in the ratio of his interest in the profits.

But these cases are not authority, and they, as also the case of Heron *v.* Hall, 1 B. Mon., 159, are opposed to the rule laid down in the later authorities.

V.

The same considerations apply to the appellants' assignment of error numbered 5.

The appellants were allowed for the capital put in by them in making up the account, and were duly credited therefor. But the amount thereof not being sufficient to meet their share of the losses they were properly required to contribute further thereto.

VI.

So also as to appellants' assignment of error numbered 6.

It does not appear which way the Court made the computation, whether to deduct the assets from the liabilities to the appellants in the first instance, and the appellees thereafter, or *vice versa*. It would make no difference in the result. Suppose it had been the former. The result would have been as follows: —

Liabilities of firm to appellants	$3,733 87
Less the funds in Court (the assets) . . .	3,733 40
Balance of liability to appellants . . .	47
Liabilities of firm to appellees	$14,434 22
Liabilities over assets (net loss) . . .	$14,434 69
$\frac{3}{8}$ of this to be contributed by appellants . .	$5,413 01
Less balance of liabilities of firms to them . .	47
Leaving to be paid by them	$5,412 54

Liabilities of firm to appellees	$14,434 22
Less the $\frac{5}{8}$ loss to be contributed by them . .	9,021 68
Balance to be paid to appellees	$5,412 54

And it should be paid to them as follows: —

Transfer to them the funds in Court . . .	$3,733 40
Balance to be paid by appellants to appellees .	1,679 14
	$5,412 54

That is to say, the appellees would have been entitled to have had the fund in Court . .	$3,733 40
Paid over to them, and there would have been still a balance due from the appellants to them of	1,679 14
Being the balance in that case to be paid to the appellees	$5,412 54

If the account was settled by deducting the fund in Court in the first instance from the sum due to the appellees the result would have been as follows: —

LIABILITIES.

The amount due Rosenstein Brothers . . .	$14,434 22
The amount due J. J. Burns & Co. . . .	3,733 87
Total liabilities	$18,168 09
Assets, money in Court	3,733 40
Balance, being the net loss . . .	$14,434 69
Five-eighths of this to be borne by Rosenstein Brothers & Sellmann amounts to . . .	9,021 68
Three-eighths to be borne by J. J. Burns & Co. amounts to	$5,413 01

The individual accounts then stand as follows: —

Amount due Rosenstein Brothers . . .	$14,434 22
Deduct from this their five-eighths of the loss .	9,021 68
Leaves a balance due to them of . . .	$5,412 54
And after paying to them the fund in Court according to the decree	3,733 40
There still remains due to them the sum of .	$1,679 14

And the amount of the appellees as follows: —

Their three-eighths of the loss as above . .	$5,413 01
Deduct the amount of the liabilities of the company to them	3,733 87
Leaves a balance due from them of . . .	$1,679 14

That is to say, if J. J. Burns & Co. had paid into the Union Fish Company this balance of $1,679.14, and if that company had paid the same over to Rosenstein Brothers, with the money in court, it would have settled the accounts and balanced the books. And as the appellants were required to pay this sum, and the appellees were entitled to receive the same sum, it was properly decreed that the former pay the same to the latter.

1 Story's Eq. (12th Ed.), Sect. 504.

No injustice was done appellants by the decree of the Circuit Court.

No injustice will be done them by allowing it to be affirmed.

In any event the appellants would not be entitled to receive the money in the registry of the Court below to the credit of this case, unless they are exonerated from contributing to the losses of the firm, even if, as they claim, it should be held that the amount due them should be entitled to priority over the amount due to the appellees in the appropriation of the assets. If this were allowed the appellants, three-eighths of the losses would exceed the assets as seen above.

But if it were computed from the data as they claim it, the share to be paid by them would be still greater.

Their figures would bring this result:—

Liabilities of the firm to appellants . . .	$3,733 87
Deduct from this the sum in Court, if allowed to them as they claim it	2,446 80
Leaves a balance of liability to them of . .	$1,287 07
Add to this liabilities to appellees . . .	14,434 22
Makes the liabilities or net loss	$15,721 29
Five-eighths of this loss to be contributed by appellees amounts to	$9,825 80
Three-eighths of it to be contributed by appellants amounts to	5,895 48
	$15,721 28
The amount due appellees from the firm being .	$14,434 22
Deduct their five-eighths of losses . . .	9,825 81
Would leave still due to them . . .	$4,608 41
The three-eighths of the loss to be contributed by appellants amounts to	$5,895 48
Deduct from this the balance of liability of firm according to these figures as they claim it .	1,287 07
Leaves due from them	$4,608 41
Which should be paid as follows to appellees:—	
Funds in Court	$2,446 80
Balance to be paid by appellants . . .	2,161 61
	$4,608 41
This would simply add to the	$1,679 14
which the decree required to be paid by appellants to appellees, three-eighths of the sum paid to settle the Mayo claim of $1,286.60 . .	482 47
	$2,161 61

The agreement filed in Court is that the appellees would allow the amount of the Mayo judgment ($1,286.60) to be paid out of the $3,733.40 in Court, which had been decreed to belong to them, and waive their right to have the appellants pay them three-eighths of it, provided the decree should be affirmed.

But if the decree is set aside the appellants are to contribute and pay three-eighths of the Mayo claim, the same having increased the liabilities of the copartnership, or decreased its assets that much. This increases the amount that appellants would be required to pay in that event to the extent of three-eighths of the Mayo judgment.

But by the agreement between the parties filed in Court, the appellees have agreed to waive that claim if thereby the litigation in this case can be ended. (Copy of Agreement Post.)

VII.

There is no error in the allowance of costs to the original plaintiffs.

(1.) The appellants demurred to the appellees' bill (Record, page 17), and the demurrer was overruled Oct. 24, 1882.

Record, pages 20 and 58.

By general rule in equity this entitled the plaintiffs to costs to that date. (Rule in Equity, No. 34.)

The Court did not find that "the then defendants had good ground in point of law or fact to interpose the demurrer, or that it was not interposed vexatiously or for delay."

This being so, the costs to which the appellees were entitled under the rule would carry all the costs in the State Court, including the officer's fees returned upon the writ, and his fees and disbursements after the return, and the taxable costs in the Circuit Court up to and including the October term, 1882.

(2.) Costs in equity while usually given to the prevailing party are within the sound discretion of the Court.

Canter *v.* American & Ocean Ins. Co., 3 Pet., 307, 319.

Atkins *v.* Edwards, 83 Va., 300.
2 Daniels Ch. Pract. (5th Ed.), star page 1382.

The allowance of costs in equity for or against a party being within the sound discretion of the Court which tries the case, an appeal, as a rule, does not lie to a decree for costs merely.

Canter *v.* American & Ocean Ins. Co., cited above.
Paper Bag Machine Co. *v.* Dickinson, 105 U.S., 766, 772.

But this Court has held that "Ordinarily a decree will not be reversed in this Court for costs merely in a suit in equity, although the Court has entire control of costs as well as merits where it has possession of the case on appeal from final decree."

Trustees *v.* Greenough, 105 U.S., 527.

If under this rule this Court would revise the decree of the Court below as to questions of costs that are within the sound discretion of the latter Court, it will not disturb the original decree as to costs, unless it clearly appears that the discretion has been abused.

In re Sellec, 111 N.Y. (Court of Appeals), 284, 290.

There is nothing in the Record that shows any abuse of the discretion given to the Circuit Court in its decree as to costs.

The appellees were the prevailing party. It was found that the Union Fish Company was indebted to them in a net balance of $14,434.22, or in the sum of $10,700.82 after paying to them the whole balance of the assets of that firm, and that the then defendants were indebted to them as their three-eighths share of the losses in the sum of $1,679.14 besides interest, and they ought to have been allowed the costs that were allowed them as such prevailing party.

Besides this the appellants made claims against the appellees at the trial in the Circuit Court to the amount of $114,860.28, which were properly disallowed by the Master, whose report

was accepted by the Court, and to which there was no exception. (Record, page 44, Schedule "F," and Master's report, pages 34 and 35 of the Record.)

Besides this the issue made by the appellants as to the $1,877.13 allowed the appellees for amounts paid by the latter to their customers for reclamations for bad mackerel made it necessary to take a large number of depositions before magistrates, commissioners, notaries, and consuls in different States and in foreign countries, involving a very large expense, all of which was caused by the position taken by the appellants on issues that were found against them. (Master's report, page 35 of Record, and items of costs allowed, Record, pages 54, 55.)

As a general rule the prevailing party is *prima facie* entitled to costs as well in a Court of Equity as in a Court of Law, and a Court of Equity will adhere to that rule unless the loosing party can show that equity requires a different judgment.

Clark *v.* Reed, 11 Pick., 446, 449.
Saunders *v.* Frost, 5 Pick., 446, 449.
2 Daniels Ch. Pract. (5th Ed.), 1382, and note 4.
Hovey *v.* Stevens, 3 Wood. & Min., 32, 33.

If, as we have already shown, the dissolution of the copartnership having been consented to by the appellants, and all objection to proceeding to take an account in the case waived by them, the decree need not recite that fact, and there was no necessity for a formal decree of dissolution, then the omission of the recital of the fact or the formal decree of dissolution of the firm would make no difference in the right of the appellees to their costs.

VIII.

The officer's return shows that he "attached all the right, title, and interest of the within-named Joseph J. Burns and Robert Tarr has in or to the personal property named in the schedule hereunto annexed and marked 'A' and which makes a part of my return" (Officer's return, Record, page 2, and Schedule "A" referred to, Record, page 4.) If this be the partnership prop-

erty referred to by the appellants in their specification of errors No. 8, it is submitted that as between these parties the appellants, $\frac{3}{8}$ interest in it was attachable.

And the Court below allowed only $\frac{3}{8}$ of the expenses connected with the preservation and keeping of this property, and disallowed $\frac{5}{8}$ thereof, which $\frac{5}{8}$ was paid by the appellants.

IX.

The items of costs in the taxation were scrutinized with great care (1) By the Clerk of the Circuit Court upon a hearing of counsel, who reported them to the Court (Record, pages 52 to 55 inclusive). (2) By the Court, the Hon. Horace Gray, an Associate Justice of this Court, and the Hon. Le Baron B. Colt, Judge of the Circuit Court, May 26, 1886 (Record, pages 55, 55). And the Court took time to consider the questions, and on the first day of June, 1885, rendered its decision by Judge Colt (Record, page 57).

The objection made by the appellants to the taxation of costs on page 54 of the Record: —

(1.) That the fees are unnecessary, excessive, and unauthorized depends upon facts, and no facts appear in the Record to sustain this objection.

The question was fully heard by the Court and taken under advisement, and the taxation revised and allowed (Record, pages 55, 57). The presumption is that the Court decided right both as to the law and the facts.

The deputy sheriff who served the writ in the case is an officer authorized to make return of fees to the Circuit Court under the circumstances of this case.

An officer who attaches personal property by virtue of a writ issuing from a State Court of Massachusetts is required by law to take and retain possession of the property attached by himself or his keeper, or the attachment will be dissolved.

Bridge *v.* Wyman, 14 Mass., 190.
Shepherd *v.* Butterfield, 4 Cush., 425, 430.

By the Statutes of the Commonwealth of Massachusetts it is provided that, "if final judgment is rendered for the plaintiff, the goods or estate attached shall be held for thirty days after judgment in order to their being taken on execution."

Mass. Gen. Sts., Ch. 123, Sect. 42.
Pub. Sts., Ch. 161, Sect. 52.

The statutes of that State also provide that "In suits in equity where an appeal can be clai ned from the final decree of a single justice, the goods and estate attached shall be held for thirty days after such right of appeal expires."

Mass. Sts. of 1877, Ch. 178, Sect. 6.
Pub Sts., Ch. 161, Sect. 53.

By the Acts of Congress it is provided that, upon removal of a cause from a State Court to a Circuit Court of the United States, that "any attachment of the goods or estate on the original process shall hold the same to answer the final judgment in the same manner as by the law of such State they would have been held to final judgment had it been rendered in the Court where it was commenced."

U. S. Rev. Sts., Sect. 646. St. of March 3d, 1875, Ch. 137, Sect 4.

There being no provision of the law by which an officer of a State who makes an attachment on process returnable to a State Court can turn the attached property over to an officer of the United States, and thereby exonerate himself upon the removal of the cause to the Federal Courts, he must keep the property and be at trouble, expense, and responsibility as to it until the cause has been disposed of in the Court to which it is removed; and he must necessarily have a right to certify his fees to the latter Court, and have the right to apply to it for leave to amend his return in case the facts require it, and to invoke its aid in case that the custody of the property is interfered with, and certify his doings to the Federal Court in which the removed cause is pending. The State Court has no power or jurisdiction over the cause after its removal.

The writ upon which the attachment was made was returnable on the first Monday, which was the fifth day of December, 1881 (Record, pages 1 and 2). The officer was required to make return of the writ with his doings thereon on that day, and did so (Record, page 2).

On the twenty-sixth day of December, 1881, the Supreme Judicial Court of Massachusetts by consent of parties passed an order appointing a receiver, and, recognizing the attachment as then valid, directed that the attached property be delivered to the receiver, and that upon such delivery that the attachment be dissolved. The officer held the property up to that time, and thence on until the receiver was ready to take it, and then, but not until then, the attachment was dissolved.

George Lane, the deputy sheriff who served the writ and made the attachment on the 15th of December, 1885, made a certificate of the costs after the return of his writ, while he held the property under the attachment up to the time it was delivered to the receiver (Record, page 53, bottom of the page). Although that certificate is referred to, the appellant has not furnished it in the Record. In its absence the appellants ought not to be allowed to say that it is insufficient in any particular. It is their duty to produce it in the Record if they wish to raise any question as to its insufficiency.

The two items of officer's fees, the one in return upon the writ, and those certified by him as accruing after the return, were allowed by the clerk of the Circuit Court, being items 18 and 19 on page 55 of the Record.

Those items are treated by the Circuit Court on page 57 of the Record as follows: "Items 18 and 19 are modified so as to disallow five-eighths ($\frac{5}{8}$) of the expense connected with the preservation and keeping of the personal property (not including vessels) attached on the writ."

Amounts of items 18 and 19	$1,220 28
Less five-eighths of $1,146.09 disallowed . .	716 33
Being allowed on both of those items only . .	503 95

Which would be but $429.76, that is three-eighths of the

actual expenses of the preservation and keeping of the personal property, and $74.17 for other taxable costs, to make up the $1,220.28.

The other five-eighths (⅝) of that expense was borne by the appellees. That is, the expenses of keeping and preserving the property while it was in the custody of the law was thus charged to the parties in proportion to their respective interests in it under Articles 21, 22 of the Agreement "A" (Record, page 14).

That is to say the appellees paid of this five-eighths (⅝)	$716 33
And the appellants were required to pay three-eighths (⅜)	429 76
The actual expense of preservation and keeping .	$1,146 09

The allowance of the attorney fee, $2.50, in the State Court is no objection to the allowance of the attorney or docket fee of $20 in the Circuit Court.

The Statutes of Massachusetts provide that "Parties recovering costs in civil causes in the Supreme Judicial Court, and Superior Court shall, in addition to the amount of other disbursements allowed by law, be allowed as follows: For an attorney fee when an issue in law, or in fact, is joined, $2.50; in all other cases, $1.25."

Mass. Gen. Stats., Ch. 156, Sect. 27.
Pub. Stats., Ch. 198, Sect. 28.

Issues of both law and fact were joined in the State Court, First, on original bill and answer; second, on amended bill and demurrer; and the fee was properly allowed there.

After the removal of the cause to the Circuit Court, there was a final hearing in equity and final decree, and the docket or attorney fee was properly taxed, under Section 824 of the U. S. Rev. Statutes.

The attorney fee in the State Court, and the docket fee in the Circuit Court are for different things, — in the State Court

where "issue is joined," and in the Circuit Court "on final hearing.

The attorney in the State Court is not an officer of the Circuit Court, nor is an attorney of the Circuit Court an officer of the State Court.

A suit removed from a State Court to a Circuit Court of the United States comes into the latter impressed with all the rights and liabilities of the parties as to costs which accrued by the laws of the State while the suit remained in the State Court; and the Acts of Congress prescribing what costs may or may not be taxed apply to such costs as accrue after the removal has become complete, and the Circuit Court is invested with jurisdiction.

Wolf *v.* Con. Mut. Life Ins. Co., 1 Flippin (Eastern District of Mich.), 377, 378.
Ellis *v.* Jarvis, 3 Mason, 457 (Story, J.).
Field *v.* Schell, 4 Blatchf., 435 (Nelson, J.).

The settled and uniform practice is, upon removal of causes from a State to Federal Court, to tax the costs that accrued in the former according to the laws of the State, and the costs that accrued in the latter according to the laws of United States.

The item in the taxation of $100 "attorney fee on forty depositions taken and used in the cause" (Record, pages 54 and 57) was properly allowed in accordance with the provisions of Sect. 824 of United States Revised Statutes.

The items in the taxation allowed for magistrates' fees in taking depositions and witnesses' fees before the Master were the usual fees allowed in such cases, and authorized by law, and properly taxed.

The presumption is that the clerk and the Court had before them at hearings on taxation of costs the proper vouchers and evidence to entitle the appellees to the allowance of the items taxed.

Nothing appears in the Record to show the contrary.

The evidence and vouchers introduced before the clerk and

the judges of the Circuit Court relating to the subject of taxation of costs are not reported.

If the appellants would have this Court revise the findings and rulings of the clerk or the judges as to the taxation and allowance of costs it was their duty to have had the evidence and vouchers reported in the Record in this case, and in the absence of such report this Court will not revise the action of the Court below.

X.

So much of the decree as requires appellants to pay the appellees interest on the $1,679.14 that was found to be due them from the former from the date of the writ to the date of the decree is sufficiently favorable to the appellants.

They were not required by the decree to pay any interest on the $9,021.69 of the capital of the appellees invested which was found to be their five-eighths of the loss. The appellees lost that, principal and interest. Nor were they required to pay any interest on the $3,733.40 that was found to be due appellees, for which they were to receive the money in the registry of the Court to that amount. The appellees lose all the interest on that, while it would seem that the appellants ought to pay three-eighths of it.

The appellants were only required to pay interest upon the balance found to be due from them to the appellees from the date of the writ in the original action.

There was no agreement between the partners as to the amount of capital of the Union Fish Company, or as to any amount that any of the partners should contribute as capital.

The agreement provides that Rosenstein Brothers are to furnish the capital to carry on the business.

Agreement "A," Art. 3, Record, page 12.

And that J. J. Burns & Co. are to draw on Rosenstein Brothers for funds required in the business in sums of not over $1,500 in any one draft.

Agreement "A," Art. 25, Record, page 14.

And that interest on the capital invested by Rosenstein Brothers is to be computed at the rate of six per cent. per annum.

Id., Art. 17, Record, page 14.

And that J. J. Burns & Co. are permitted to draw from the funds of the business $50 per week for individual use and account.

Id., Art. 26, Record, page 14.

It was competent for the Circuit Court to find that it was the intention of the parties as manifested by the terms of the agreement and circumstances of the case, that the appellees should be allowed interest on the capital to be advanced by them until they were repaid; in which case the appellants ought to be required to pay interest in this case on three-eighths of it.

Bradley *v.* Brigham *et als.*, 137 Mass., 545.
Baker *v.* Mays, 129 Mass., 517.
Millar *v.* Craig, 6 Beav., 433.
Hollister *v.* Barkley, 11 N.H., 501, 511, 512.
Barfield *v.* Loughborough, L. R., 8 Ch. App., 1.
Pilling *v.* Pilling, 3 DeGrex, Jones, & Smith, 162.
Collyer on Part. (Perkins' Ed.), Sect. 335, note 4.
Stoughton *v.* Lynch, 2d John Ch., 209, 212.
Morris *v.* Allen, 14 N. J. Eq., 44, 46.

In Bradley *v.* Brigham a copartnership was formed between A, B, C, and D, under an agreement by which A and B were to furnish all the capital; the partners were to share equally the profits and losses, and interest was to be credited or charged to the partners respectively, on the yearly balances due to or from them. A and B advanced all the money used in the business; interest was charged and allowed by the parties in their accounts on the different balances until the dissolution of the copartnership. It was held upon a settlement of the partnership account in equity that the parties intended that interest should continue on the balances until they were settled, without regard to dissolution of the copartnership.

In Millar *v.* Craig a stipulation that interest should be allowed on the capital of the partners was presumed from the course of dealings between them, and interest was accordingly allowed.

In Hollister *v.* Barkley the rule is held that "interest should be allowed from the time of the dissolution." This case follows the rule laid down in Stoughton *v.* Lynch.

In Barfield *v.* Loughborough simple interest was allowed, on the ground that the agreement required it.

In Morris *v.* Allen the Chancellor says (p. 46): "The right of a partner to receive interest on advances made by him for the benefit of the firm, in the absence of an express agreement for that purpose, rests upon the usage of trade, . . . the usage raising an implied contract to pay interest on the principal advanced."

In Pilling *v.* Pilling it was found from the previous mode of accounting between the parties that there was an agreement that each partner should have interest upon his capital, and that the interest must be paid until the principal was paid, although the partnership had been dissolved for several years.

Most, if not all, of the cases where interest has been disallowed are cases in which no agreement, express or implied, to pay interest was found.

The capital invested by Rosenstein Brothers was in the nature of a loan to the Union Fish Company, upon which, by the agreement, they were to receive interest at the rate of six per cent. per annum.

This is not a case where the capital remains in the firm to be divided, pending proceedings for the settlement of its affairs. But it is a case of loss, where partners are required to contribute under the articles of agreement and the order of the Court to pay losses.

The decree shows that the Circuit Court found that the five-eighths of the loss to be shared by Rosenstein Brothers & Sellmann was $9,021.68, and that was charged off to them, they losing that amount and all the interest thereon.

The decree also shows that the Court found that in order to make up the amount due to Rosenstein Brothers in part, they

were to receive the funds in the registry of the Court amounting to $3,733,40; and as a result they lose all the interest on that sum, as well as on the $9,021.68.

And all the interest that the appellees drew upon the $14,434.22, that it was found that they had advanced to the Union Fish Company under the agreement, and which was due from it to them, was interest on the balance of $1,679,14, which was found to be due from the appellants to the appellees, from the date of the writ in this case.

It would be obviously inequitable to require the appellees to contribute to the losses of the Union Fish Company interest on this sum of $1,679.14, and to say the appellants should pay no part of the loss on the interest account.

XI.

The decree of the Circuit Court ought not to be set aside on account of the suit by Israel C. Mayo, mentioned in the Master's report (Record, page 37). That claim has been settled by agreement of all parties, which was filed in the Circuit Court, and stipulated that a copy thereof attested by the clerk of the Circuit Court may be filed in this case in this court.

Under that agreement that claim is fully satisfied out of the funds in the registry of the Circuit Court, which by its decree had been declared to belong to the appellees, to which they agreed, and also agreed to waive all right and claim to have or require appellants to contribute or pay anything towards the payment of their share of the same if the decree be not set aside.

No injustice is or can be done to the appellants. They are released from the payment of three-eighths of that claim, and the whole practically assumed and paid by the appellees.

By the principles of justice the decree ought to stand.

Brenly *v.* Kupper, 6 Pick., 179.
Ting *v.* Thayer, 8 Allen, 391.

A certified copy of the agreement and the certificate of the clerk of the Circuit Court that the claim had been satisfied

according to it, duly authenticated as stipulated in the agreement, is filed in this Court, and a copy of it subjoined, which is as follows: —

Exhibit "A."

CIRCUIT COURT OF THE UNITED STATES.

District of Massachusetts, ss.

IN EQUITY.

1746.

JULIUS W. ROSENSTEIN *et als v.* JOSEPH J. BURNS *et al.*

1746 A.

ISRAEL C. MAYO, *Petitioner, v.* JULIUS W. ROSENSTEIN *et als.*

AGREEMENT. (Filed Dec. 27, 1889.)

It is agreed in said causes as follows: —

1. That there may be paid from the moneys in the registry of this Court to the credit of the cause first above mentioned the sum of twelve hundred and eighty-six dollars and sixty cents to said Mayo, or his assigns, the check to be made payable to E. J. Hadley, attorney of record for said Mayo, in full payment and satisfaction and discharge of the judgments in his favor mentioned in his said petition, and that thereupon said petition may be dismissed.

2. And said Rosenstein Brothers and Henry Sellmann, plaintiffs in the cause first above mentioned, hereby agree to waive any claim that they have, or may have, for contribution

against said Joseph J. Burns or his estate, and against said Robert Tarr personally, or as surviving member of the firm of J. J. Burns & Company, for contribution toward said sum so paid in pursuance of this agreement in satisfaction of said judgments out of said moneys in the registry of this Court, provided that the decree heretofore entered in this Court in the cause first above mentioned be not reversed upon the appeal therefrom now pending in the Supreme Court of the United States at Washington, and entitled upon the docket of said Supreme Court, Joseph J. Burns *et al. v.* Julius W. Rosenstein.

3. And it is agreed by said Joseph J. Burns & Co. that said payment to said Mayo as herein above mentioned shall be without prejudice to said Rosenstein Brothers & Sellmann, except as herein above agreed by them.

4. And it is further agreed that copies of this agreement, with the statement of the fact that said money has been paid in, in full satisfaction of said judgments in favor of said Mayo, certified to by the clerk of this Court, may be filed or used in said appeal pending in the Supreme Court of the United States by either of the parties to said cause that shall so desire.

Dated this 27th day of December, A.D. 1889.

BENJ. F. BUTLER,
Solicitor and Counsel for Burns and Trustees.

W. F. & W. S. SLOCUM,
Solicitor for Rosenstein Bros. & Sellmann.

EUGENE J. HADLEY,
Solicitor for Mayo & Dolliver Brothers, Assignees.

It is ordered and decreed by the Court as agreed by the parties in the foregoing stipulation.

THOS. L. NELSON,
District Judge.

Dec. 28, 1889.

UNITED STATES OF AMERICA.

Massachusetts District, ss.

I, John G. Stetson, Clerk of the Circuit Court of the United States, within and for the District of Massachusetts, certify that the foregoing is a true copy of an agreement filed in the causes in which said agreement is entitled on the 27th day of December, A.D. 1889, and of the order of Court thereon.

I further certify that on the 28th day of December, A.D. 1889, the sum of twelve hundred and eighty-six dollars and sixty cents was paid out of the funds in the registry of this Court pursuant to the said agreement and order of Court.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said District, this eighteenth day of January, in [SEAL.] the year of our Lord one thousand eight hundred and ninety, and of the independence of the United States the one hundred and fourteenth.

JOHN G. STETSON,
Clerk.

XII.

The appellees request that the decree of the Circuit Court that the appellants pay to them the several sums mentioned in it, viz. : —

The balance found due from appellants to them of	$1,679 14
And interest thereon from the date of the original writ, viz., Nov. 7. 1881, to the date of that decree, viz., May 6, 1888, amounting to .	452 80
The whole amounting to (see Decree, Record, pages 51, 52)	$2,131 94
And the costs of that suit as allowed by the Circuit Court to be taxed in favor of the appellants, amounting to	973 34
Amounting in the whole to	$3,105 28

Be affirmed, and that interest on said sum of three thousand one hundred and five dollars and twenty-eight cents from the date of said decree at the rate of six per cent. per annum be allowed them.

And that the sum of	$3,733 40
in the registry of the Circuit Court to the credit of this case less the sum of	1,286 60
paid out of said fund in satisfaction of the claim of Israel C. Mayo: —	
To wit, the balance of	$2,446 80

be paid over to the appellees or their attorney of record.

And that the appellees recover of the appellants interest on said balance of $2,446.80, the funds in the registry of the Circuit Court be paid to them from the date of said original decree at the rate of six per cent. per annum, and that said interest upon said balance of $2,446.80 be added to the amounts to be paid by the appellees to the appellants.

And that the appellees have execution against the appellants for said sum of three thousand one hundred and five dollars and twenty-eight cents ($3,105.28) and the interest thereon as aforesaid, and the interest on said balance of twenty-four hundred and forty-six dollars and eighty cents, from the date of the original decree, to wit: May 6, 1886, to the time of the order and decree upon which such execution shall issue, and their costs from the time of the appeal in this case to be taxed.

The rate of interest above mentioned is the rate established by law in the Commonwealth of Massachusetts. The statute provides as follows: "Where there is no agreement for a different rate, the interest of money shall be at the rate of six dollars upon each one hundred dollars for a year;"

Mass. Public Sts., Ch. 77, Sect. 3.

The appellees are entitled to such additional interest on all of said sums as damages occasioned by the appeal, and to their costs upon the appeal.

W. F. SLOCUM,
Counsel for Appellees.